

BCI EXHIBIT

47

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 08-13555

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In the Matter of:

LEHMAN BROTHERS HOLDINGS, INC.

Debtor.

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United States Bankruptcy Court

One Bowling Green

New York, New York

September 16, 2008

5:13 PM

B E F O R E:

HON. JAMES M. PECK

U.S. BANKRUPTCY JUDGE

1
2 HEARING re Debtor's Motion, Pursuant to Section 105 of the
3 Bankruptcy Code, for an Order Enforcing the Protections of
4 Section 362 of the Bankruptcy Code
5

6 HEARING re Motion to Extend Deadline to File Schedules or
7 Provide Required Information : Debtor's Motion Pursuant to
8 Bankruptcy Rules 1007(c) and 2002(d) (i) Extending the Time to
9 File Schedules of Assets and Liabilities, Schedules of Current
10 Income and Expenditures, Schedules of Executory Contracts and
11 Unexpired Leases, and Statements of Financial Affairs and (ii)
12 Waiving of the Requirements to File the Equity List and Provide
13 Notice to Equity Security Holders
14

15 HEARING re Debtor's Motion Pursuant to Section 105(a) of the
16 Bankruptcy Code and Local Bankruptcy Rule 1007-2(d) for Waiver
17 of the Requirements of Local Bankruptcy Rule 1007-2(a) and
18 1007-2(b)
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2 HEARING re Debtor's Motion Pursuant to Sections 105(a), 342(a),
3 and 521(a)(1) of the Bankruptcy Code, Bankruptcy Rules 1007(a)
4 and 2002(a), (f) and (1), and Local Bankruptcy Rule 1007-1 for
5 (i) a Waiver of the Requirement to File a List of Creditors and
6 (ii) Approval of the Form and Manner of Notifying Creditors of
7 the Commencement of the Debtor's Chapter 11 Case

8
9 HEARING re Motion of Lehman Brothers Holdings Inc. for Order,
10 Pursuant to Section 105 of the Bankruptcy Code, Confirming
11 Status of Clearing Advances

12
13 HEARING re Motion to Authorize Application Pursuant to 28
14 U.S.C. 156(c) and Local Rule 5075-1(a) for Authorization to (i)
15 Employ and Retain Epiq Bankruptcy Solutions, LLC Claims and
16 Noticing Agent for the Debtor, and (ii) Appoint Epiq Bankruptcy
17 Solutions, LLC as Agent for the Bankruptcy Court

18
19 HEARING re Debtor's Motion Pursuant to Section 105(a) of the
20 Bankruptcy Code and Bankruptcy Rules 1015(c) and 9007 Seeking
21 Authority to Implement Certain Notice and Case Management
22 Procedures

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1 P R O C E E D I N G S

2 THE COURT: Please be seated. Let's begin. I'm
3 sorry for those who can't sit down because we're so crowded.

4 MR. WAISMAN: Good evening, Your Honor. Shai Waisman
5 of Weil, Gotshal & Manges on behalf of Lehman Brothers Holdings
6 Inc. I am joined today by my colleagues, Richard Krasnow,
7 Michele Meises, and Garrett Fail.

8 Your Honor, Lehman Brothers Holdings Inc. commenced a
9 Chapter 11 case in this court on September 15th with a petition
10 and a number of pleadings. If it pleases Your Honor, I propose
11 we proceed in the following way. Well, this is Your Honor's
12 court. Perhaps a bit of --

13 THE COURT: I'll listen to the proposal.

14 MR. WAISMAN: Perhaps a bit of background, then take
15 Your Honor through the pleadings that have been filed and the
16 request for relief and then scheduling matters. Before we
17 begin, of course, thank you to court personnel, chambers and
18 Your Honor for accommodating us and, of course, to our
19 colleagues here today who I feel we kept waiting for a little
20 while in the delay in today's hearing and I do apologize.

21 Your Honor, by way of background, Lehman Brothers is
22 the fourth largest investment bank in the United States. The
23 company was founded over a hundred and fifty years ago by the
24 son of a cattle merchant who left his home in Bavaria to start
25 a dry goods store in Montgomery, Alabama. Today, the company

1 serves the financial needs of corporations, governmental units,
2 institutional clients and individuals worldwide. The company
3 employs upwards of 25,000 people and has significant assets the
4 world over. It has headquarters here in New York, regional
5 headquarters in London and Tokyo and a network of offices in
6 North America, Europe, the Middle East, Latin America and the
7 Asia Pacific region. As of May 31st, 2008, Your Honor, the
8 company's consolidated assets totaled 639 billion dollars and
9 its consolidated liabilities totaled approximately 613 billion
10 dollars.

11 The company itself operates in three business
12 segments: capital markets, investment banking and investment
13 management and I'm sure we'll be discussing a lot more about
14 those segments in the days and weeks to come.

15 The company, of course, is subject to regulatory
16 oversight. All of the Lehman Brothers entities are subject to
17 group-wide supervision by the SEC. Several of the
18 subsidiaries, including the subsidiary named Lehman Brothers
19 Inc., are registered with the SEC as broker dealers, others as
20 derivatives dealers and investment advisors. Consequently,
21 those entities are subject to regulation by the SEC as well as
22 self-regulatory organizations, national securities exchanges,
23 such as the New York Stock Exchange, and Municipal Securities
24 Rulemaking Board.

25 Other subsidiaries of the debtor hold national bank

1 charters and are subject to regulation by federal and state
2 authorities, including the OTS, the Office of Thrift
3 Supervision, the FDIC, Federal Deposit Insurance Corporation,
4 and the Office of the Comptroller of Currency of the United
5 States. The debtor's insurance subsidiaries are subject to
6 state insurance regulations in states in which they operate.

7 Lehman Brothers holds memberships or associate
8 memberships on several international securities and commodities
9 exchanges, including London, Tokyo, Hong Kong, Frankfurt,
10 Paris, Milan, Canada, India, Turkey, Russia, Dubai and Qatar.
11 As I said, the scope of this enterprise is global in nature.

12 The debtor has issued various securities to the
13 public and has various debt obligations which are disclosed in
14 the filings and will be disclosed in additional filings going
15 forward.

16 The events leading up to this Chapter 11 case have
17 been widely reported and there is nobody who is not familiar
18 with the global crisis. Because Lehman Brothers is a financial
19 services firm, it is materially affected by conditions in the
20 global financial markets as well as worldwide economic
21 conditions. For most of 2008, Lehman Brothers operated in an
22 extremely unfavorable global business environment. The
23 conditions of this environment were characterized by continued
24 lack of liquidity in the credit markets, significantly
25 depressed volumes in most equity markets and declining asset

1 values. The slowed growth in major economies all over the
2 world as a result of declining business and consumer confidence
3 only added to all of these hardships. Commodity prices have
4 risen significantly with oil and gold reaching record levels
5 and the rising cost of industrial production. Consumer
6 spending was challenged by a combination of lower wealth from
7 declining housing values, higher commodity prices, impacting
8 levels of disposable income and falling private sector
9 employment growth. Low levels of liquidity combined with the
10 requirement that financial companies de-lever their balance
11 sheets resulted in downward pressure on financial asset prices
12 including at Lehman Brothers. These global economic conditions
13 depressed both the valuations of Lehman's inventory position as
14 well as transactional volumes and market activity levels in
15 which Lehman Brothers capital markets and investment banking
16 business segments operated during the recent fiscal quarters.

17 The instability in the financial and credit markets
18 created significant liquidity problems for Lehman Brothers.
19 During this period, although central banks provided
20 liquidity -- every time I speak, for some reason --

21 THE COURT: There seems to be somebody trying to jam
22 the line.

23 MR. WAISMAN: Yeah, exactly.

24 THE COURT: I know that there are some people who are
25 participating telephonically through the court call service and

1 also there is another courtroom where I think we're being
2 connected. But I don't think it's fair to Mr. Waisman to
3 proceed like this. So if anybody is on the phone and has a
4 mute button, please push it now and let's see if that helps.
5 Maybe a little.

6 MR. WAISMAN: I'm afraid to say anything. Okay.

7 THE COURT: Do you have a BlackBerry or any other
8 electronic device on you?

9 MR. WAISMAN: No, I don't.

10 THE COURT: Let's try again and hope for a better --

11 MR. WAISMAN: Okay. Picking up where we left off --

12 THE COURT: -- reception.

13 MR. WAISMAN: -- the instability in the financial and
14 credit markets, with which we're all familiar, created
15 significant liquidity problems for Lehman Brothers. Central
16 banks provided additional liquidity to try and jump start the
17 financial systems but broad asset classes remained very thinly
18 traded. This was particularly true of domestic subprime
19 residential mortgages and structured credit products.

20 The devaluation of the pledged assets adversely
21 impacted Lehman's borrowing availability. As its secured
22 financing fell out of reach, Lehman Brothers was forced to draw
23 down on its liquidity pool in order to execute transactions.
24 At the same time, Lehman's clearing banks required Lehman to
25 post increasing amounts of collateral to secure against such

1 clearing banks' exposure to Lehman, and the loss of liquidity
2 created a chain reaction of adverse economic consequences.
3 Essentially, this began the stranglehold on Lehman Brothers, to
4 use an often-used cliché in this court, it was the perfect
5 storm.

6 The company's management responded by exploring
7 various options to restructure operations, to reduce overall
8 cost structure and to improve performance. Management
9 recognized the concerns caused by the company's concentrated
10 position in real estate related assets and initiated steps to
11 separate those assets from the rest of Lehman Brothers'
12 operations.

13 To minimize the effect of pervasive rumors in the
14 marketplace, which have had significant impact to Lehman
15 Brothers' competitors recently, the company made several public
16 announcements on September 10th, 2008 as to its performance.
17 At the same time, in light of the continuing diminution in
18 value of Lehman Brothers' assets, the increasing to market
19 obligations and the debtor's plummeting stock price, management
20 announced several major initiatives to stabilize the business
21 as well as pursuing several strategical alternatives all on
22 multiple tracks.

23 The announcement that I just mentioned on September
24 10th unfortunately did little to quell the rumors in the market
25 and concerns about the company's viability. The uncertainty,

1 particularly among the banks, through which the company clears
2 securities, trades, ultimately made it impossible for the
3 company to continue to operate its business. The destruction
4 to its business virtually guaranteed that the company would not
5 be able to sustain itself long enough to implement all of the
6 initiatives that had just recently been undertaken.

7 The company's liquidity crisis prompted an emergency
8 meeting on September 12th, 2008 just down the block here at the
9 Federal Reserve between debtor's management, officials from the
10 New York branch of the Federal Reserve Bank, the heads of major
11 financial institutions, the treasury secretary and the SEC
12 chairman. These emergency meetings, as was widely reported,
13 continued throughout the weekend, throughout the 13th and the
14 14th. The company, in those meetings and outside, continued to
15 explore a number of strategic alternatives. Unfortunately, at
16 the end of this weekend on Sunday, it became clear that no
17 viable alternative existed. Lehman Brothers Holdings Inc. was
18 left with no alternative but to commence a Chapter 11 case in
19 this court so that it could preserve its assets and maximize
20 value for the benefit of all of its customers and all of its
21 stakeholders.

22 Those, Your Honor, are my introductory remarks about
23 the business and why we're here today, unfortunately. With
24 that, I would propose we proceed with a few of the motions that
25 were filed. These are mainly administrative in nature and I

1 will go through them as quickly as is possible. Of course, if
2 Your Honor has any questions, you'll stop me and I will answer
3 them.

4 THE COURT: That's fine. Thank you.

5 MR. WAISMAN: Your Honor has been provided, I
6 believe, with a binder that was dropped off at chambers and
7 I'll proceed in virtually the order in here with one exception.
8 Unfortunately, I know people in the courtroom have not had a
9 chance to review the outline of the binder but the pleadings
10 have been filed, have been publicly available.

11 THE COURT: Let me ask you one question about what
12 typically occurs at the beginning of cases regardless of size.
13 And that is, some consultation with the United States trustee's
14 office concerning so-called first day pleadings and orders.
15 Has that happened here and, if not, is there anyone from the
16 U.S. trustee's office prepared to, in effect, sign off on the
17 relief you're requesting?

18 MR. WAISMAN: Thank you, Your Honor. There are
19 several members of the office here. In fact, the U.S. trustee
20 herself is here. In terms of consultation, we had obviously,
21 with a business the size and nature of Lehman Brothers, there
22 was great concern about any leaks that any preparations were
23 underway, particularly in light of the fact that there were so
24 many strategic alternatives that people were working on. And
25 the genuine fear was that if there was too much discussion --

1 THE COURT: To talk about it would make it worse, in
2 effect.

3 MR. WAISMAN: -- could make it worse and could
4 overtake what was otherwise a viable alternative. As a result
5 and, unfortunately and regrettably, there was no opportunity to
6 consult with any of the parties prior to the filing, not with
7 the Court and, regrettably, not with the Office of the United
8 States Trustee. They are here and I'm sure they'll speak for
9 themselves. I know they have the pleadings. We did have a
10 brief conversation in the hallway. They raised an issue with
11 us and I'm going to represent, I believe, a consensual
12 resolution on the one issue that was raised on the record. And
13 that will necessitate an order to be submitted later this
14 evening reflecting that resolution.

15 MS. HOPE DAVIS: Good evening, Your Honor. Tracy
16 Hope Davis for Diana Adams, the United States trustee. I'm
17 here with my colleague, Paul Schwartzberg. Mr. Waisman's
18 comments are accurate. We did have an opportunity to confer
19 with respect to the pleadings that have been filed. And I will
20 allow him to articulate our resolution as to that pleading.
21 That is the 1007 motion seeking a waiver, if I'm correct, with
22 respect to compliance with that section.

23 THE COURT: I had some concerns about that pleading
24 as well.

25 MS. HOPE DAVIS: Yes. And Mr. Waisman and I -- we

1 have spoken and I know that he will articulate our position
2 with respect to that or our resolution per se.

3 I have nothing further, Your Honor.

4 THE COURT: Okay. Thank you.

5 MS. HOPE DAVIS: Thank you.

6 MR. WAISMAN: One other point of information for the
7 Court before we do proceed. As part of the conversations with
8 the Office of the United States Trustee, the debtors -- they
9 made a request or brought to the office's attention the events
10 that are going to occur here today and hopefully in the near
11 future. And there was discussion about the immediate
12 appointment of an official committee of unsecured creditors.
13 And, in fact, the office has solicited acceptances to serve on
14 a committee and there will be a meeting, organizational
15 meeting, for the creditors' committee this evening at 6 p.m.
16 and the debtors very much hope that out of that there will be a
17 creditors' committee and professionals retained so that there
18 is somebody -- there is a committee to engage in the process
19 going forward on a very fast track.

20 THE COURT: Okay. Fine.

21 MR. WAISMAN: Your Honor, the first motion, which
22 would appear in Your Honor's binder under Tab 4, which is the
23 Section 362 motion, otherwise known as the automatic stay
24 comfort order -- Your Honor, this is a motion that, in essence,
25 reflects precisely what the automatic stay provides and nothing

1 more. This is a global business. There are many parties-in-
2 interest, both in this country and abroad, that do not
3 understand the implications of the automatic stay and, in fact,
4 don't -- for some strange reason don't take the time to refer
5 back to the Bankruptcy Code when the debtor complains about
6 violations and insists on seeing orders. Because of the nature
7 of the debtor's global business and the thousands, if not
8 hundreds of thousands, of parties-in-interest, this order is
9 very important to the debtors.

10 Two parties have raised concerns to make sure that
11 the order does not go beyond the limitations of Section 362,
12 including the United States Attorney's Office. What we would
13 propose is this order be approved on the record. We would
14 then, together with the two parties that have complained -- not
15 complained, but asked for clarifying language, work out a
16 consensual order and submit it to chambers when it has been
17 worked out among the parties.

18 THE COURT: I will approve this motion subject to the
19 drafting process that you described. It looks like there's
20 somebody who maybe doesn't want me to approve it because I see
21 Mr. Herman standing. Or at least he wants to comment.

22 MR. HERMAN: Thank you, Your Honor. Just want to
23 comment --

24 THE COURT: You'll have to speak up so you can be
25 heard by the recording system.

1 MR. HERMAN: Sorry. Can you hear me from here? Or
2 should I come up?

3 THE COURT: I can hear you but I'd like the record to
4 reflect what you have to say. So you might want to struggle to
5 come forward.

6 MR. HERMAN: Ira Herman, Thompson & Knight, for
7 Chevron, Your Honor. Chevron would like to be involved in the
8 drafting of the order to make sure that the order does not go
9 on beyond the scope of Section 362.

10 THE COURT: Well, I think I'm the person who's going
11 to confirm that it doesn't go beyond the scope of 362, not you.

12 MR. HERMAN: Your Honor --

13 THE COURT: So here's what I propose. So that we
14 don't convert the drafting of an order which, by the
15 representations of counsel, will not go beyond Section 362, I
16 strongly urge that something this important to the debtor and
17 this routine, relatively speaking, in large Chapter 11 cases in
18 this district, not be converted into a drafting exercise. So,
19 while I understand your request, you're not going to get
20 approval from me.

21 MR. HERMAN: Fair, Your Honor. My understanding was
22 that there were two parties who have raised objections and
23 would be reviewing the order, the form of order. I was just
24 asking for the similar --

25 THE COURT: If the debtor is willing to do that with

1 you, that's fine because I think consensual behavior is to be
2 encouraged. But if what you're looking for is a statement from
3 me that you have that right simply because you stood up, I'm
4 not going to give you that.

5 MR. HERMAN: Well, may I ask Mr. Waisman if it'll
6 accommodate Chevron?

7 MR. WAISMAN: Perhaps there's a way to resolve this.
8 Maybe I should continue with these motions. And perhaps Mr.
9 Herman could speak to my partner, Mr. Krasnow, and agree on
10 language. And if not, we would come back and --

11 THE COURT: Well, before you move on, because I think
12 that there's nothing more important, at least as I've seen
13 press reports, than confirming that the automatic stay applies
14 globally. And we have a variety of important first day
15 motions. And ordinarily, this would not be an important one.
16 But I don't want there to be any even scintilla of a hiccup
17 with respect to this issue. So I don't want to move on and
18 make this a matter for discussion.

19 I'd like to understand what the issues are that have
20 been identified with the language of the order as it presently
21 exists. And to the extent that all we are doing is carving
22 back something so that it fits neatly within the precise
23 language of 362, that should be a relatively simple
24 undertaking. What's the issue or what are the issues?

25 MR. HERMAN: Your Honor, to the extent the language

1 of the order is carved back so that it follows 362 and so
2 there's no question that the safe harbor provisions are
3 preserved, there is no issue. To the extent the order goes
4 beyond Section 362, you just heard the concern.

5 THE COURT: Okay.

6 MR. WAISMAN: Your Honor --

7 THE COURT: I think everybody is concerned about the
8 safe harbor provisions in this case. So I can't imagine that
9 one client represented by one law firm would have a particular
10 interest in that beyond anybody else.

11 MR. WAISMAN: That is the issue that has been raised
12 by the other parties and, in fact, of course we confirm this is
13 not meant to affect the safe harbor provisions in Section 362.
14 And I think that is an easy modification to be made very
15 quickly to the order.

16 THE COURT: Fine. Let's do the following. I'm
17 approving your comfort order. And I want it to provide that
18 comfort immediately and without reservation. The
19 understanding, however, is that the language of the comfort
20 order will be so crafted as to fit neatly and thoroughly within
21 the scope of Section 362 as it's drafted including all of its
22 provisions. Fair enough?

23 MR. WAISMAN: Fair enough.

24 THE COURT: Does that accurately state what the
25 debtor's intent is as well?

1 MR. WAISMAN: Precisely.

2 THE COURT: Fine. Then I can't imagine that we're
3 going to have a major issue except for whether or not there was
4 a scribner's error. So let's move forward.

5 MR. HERMAN: Thank you, Judge.

6 MR. WAISMAN: Under Tab 5, Your Honor, it's the
7 debtor's motion for the waiver of the requirements of local
8 Bankruptcy Rule 1007(2)(a) and 1007(2)(b). Your Honor --

9 THE COURT: This is the one the U.S. trustee spoke
10 to.

11 MR. WAISMAN: That is correct, Your Honor. And the
12 agreement with the Office of the United States Trustee is that
13 rather than make it an explicit waiver, we would have a forty-
14 five day extension -- the debtor would have a forty-five day
15 extension to come into compliance with the local rule, subject
16 to the debtor's right to come back and ask for a waiver or
17 additional time. And I have, of course, represented to the
18 Office of the United States Trustee that we would, in fact,
19 endeavor to comply with the requirements of the local rule
20 during that time.

21 THE COURT: Fine. That resolution is satisfactory to
22 me. Is it satisfactory to the office?

23 MS. HOPE DAVIS: It is, Your Honor. Thank you, Mr.
24 Waisman.

25 THE COURT: I'll make this one comment. We sought to

1 determine whether or not the representations made in this
2 motion were, in fact, true in terms of the ability to publicly
3 access most of the information anyway. And we may not have
4 done it perfectly. But the one item that seemed not to be easy
5 to locate publicly but seems to be relatively easy for you to
6 comply with is the identity of the holders of the five largest
7 secured claims. I'm not proposing anything different from what
8 you've already agreed to with the Office of the U.S. Trustee.
9 But you might go a long way toward providing the public with
10 everything that they would ordinarily have with immediate
11 compliance by simply providing that information online. So I
12 make that suggestion.

13 MR. WAISMAN: Thank you, Your Honor. The debtor
14 appreciates the suggestion and we'll endeavor to comply with
15 the Court's suggestion and the local rule.

16 From there, Your Honor, I would turn, actually, to
17 Tab 10, which is the extension of time to file schedules of
18 assets and liabilities and waiving the requirement to file an
19 equity list. I simply do so so we don't pop up and down here
20 as my partner, Mr. Krasnow, will be handling the motion
21 confirming the status of clearing advances which appears under
22 Tab 10 -- under Tab 9, excuse me.

23 So, proceeding with the schedules motion under Tab
24 10, Your Honor, this is the standard waiver motion. The debtor
25 here requests an additional forty-five days, that is, forty-

1 five days beyond the fifteen days for a total of sixty days
2 subject to the debtor's right to come back and request
3 additional time if the debtor cannot comply. I'm happy to
4 answer any questions Your Honor has.

5 THE COURT: I have no questions. And I assume
6 because there's no comment from the U.S. trustee's office that
7 that's acceptable as well to your office.

8 MS. HOPE DAVIS: It is, Your Honor.

9 THE COURT: Thank you.

10 MR. WAISMAN: Thank you.

11 THE COURT: I'll grant that motion.

12 MR. WAISMAN: Your Honor, finally, for me at least,
13 the application to retain Epiq Bankruptcy Solutions, LLC as
14 claims and noticing agent. Your Honor this retention has been
15 vetted and cleared with the assistant clerk of the court. It
16 is the standard retention application for Epiq Bankruptcy
17 Solutions and, in fact, they are up and running --

18 THE COURT: It's fine. I've also cleared this with
19 the clerk of the court. So you're good to go.

20 MR. WAISMAN: Upon the highest authority, Your Honor.
21 Thank you.

22 Your Honor, Richard Krasnow, my partner, will address
23 the clearing advances motion.

24 MR. KRASNOW: I think it's still the afternoon so
25 good afternoon, Your Honor.

1 THE COURT: Depends on what continent.

2 MR. KRASNOW: Although I'm not sure what day it is,
3 Your Honor.

4 Your Honor, in his opening remarks, Mr. Waisman
5 referred to the various functions -- or to the functions and
6 critical functions that are provided by various financial
7 institutions in connection with clearing various securities
8 transactions. Without these clearing entities, financial
9 transactions involving securities, derivatives and the like,
10 simply could not be implemented. JPMorgan Chase, Your Honor,
11 is the main clearing agent for all transactions of, among
12 others, Lehman Brothers Inc., the broker dealer, the main
13 broker dealer of the holdings. And as Mr. Waisman indicated,
14 it is a non-debtor.

15 On any one day, the level of securities transactions
16 that take place during the course of the day can amount to the
17 trillions. This is one of those cases, Your Honor, when you
18 drop a zero with respect to the amounts of assets, the volume
19 of transactions and the liabilities, it almost seems like a
20 rounding error. It doesn't seem real but it very much is.

21 Your Honor, JPMorgan Chase operates pursuant to a
22 variety of agreements, clearing agreements, and as well a
23 guaranty of the obligations of various Lehman entities
24 including, in particular, the broker dealer by holdings. Those
25 obligations by the broker dealer as well as holdings are

1 secured. And, Your Honor, in that regard, JPMorgan Chase holds
2 what we estimate to be collateral having the value of
3 approximately seventeen billion dollars in either securities or
4 cash, the cash amount being approximately 6.9 billion dollars.
5 Most of the collateral that JPMorgan Chase holds represent
6 assets of Lehman Brothers Inc. The cash component, however,
7 represents monies which were posted, deposited as cash
8 collateral prior to the Chapter 11 case's commencing.

9 Your Honor, JPMorgan Chase has indicated that they
10 are prepared to continue to provide this critical function
11 without which, for example, customer transactions could not
12 happen. But during the course of any day, as I understand
13 these transactions -- and Mr. Novikoff is here on behalf of
14 JPMorgan Chase and I encourage him to correct me or to fill in
15 any blanks with respect to exactly how this all works. But
16 during the course of any one day, there are, in essence,
17 advances which are made by JPMorgan Chase with respect to the
18 transactions that occur. Securities are delivered. You
19 haven't yet received the cash with respect to the securities
20 and the like which is, in part, what these collateral secures
21 and what the guaranty that was issued by the holdings company
22 covers.

23 Your Honor, JPMorgan Chase has indicated that it is
24 willing to continue to act as the clearing agent. However,
25 they do need a certain level of comfort, which is completely

1 understandable, that with respect to the ongoing transactions
2 that will take place that indeed the guaranty, which was issued
3 by Lehman Brothers, will continue to cover those transactions
4 and they will continue to be secure with respect to their
5 existing collateral as to those future transactions. In our
6 view, we believe that the guaranty and the collateral covers
7 not only those transactions which have already occurred but as
8 well the future transactions. But given the amounts involved
9 here, we believe it is perfectly understandable that JPMorgan
10 Chase should want a level of comfort, slightly different
11 comfort order than we discussed earlier but just as key, if not
12 more critical, in terms of the broker dealer being able to
13 continue to operate in the ordinary course and customers to
14 continue to be protected.

15 Your Honor, we would request, therefore, that the
16 Court -- if you will confirm that indeed the collateral they
17 have and the existing guaranty will cover all future
18 transactions or, alternatively, confirm that the advances and
19 financial accommodations that JPMorgan Chase will be providing
20 to us on an ongoing basis are covered by Section 364 and that
21 their existing collateral can be looked to to secure those
22 obligations. The lien which they assert with respect to the
23 collateral will have the same status it had pre-petition. To
24 our knowledge, nobody else has a lien with respect to that
25 collateral. This is not a situation of priming, junior liens

1 or the like. It is very straightforward, Your Honor.

2 THE COURT: We're talking about a possessory lien?

3 MR. KRASNOW: It's my understanding it is a
4 possessory lien. Your Honor, we have described somewhat in the
5 motion papers the nature of these transactions. As I've
6 indicated, Mr. Novikoff is here in case there are any questions
7 the Court has that I perhaps cannot answer. But for the
8 reasons I've indicated, we would request that the relief be
9 granted.

10 THE COURT: Fine. I would like to hear from Mr.
11 Novikoff, principally to confirm why this comfort is needed. I
12 realize that that's exactly what has been presented by counsel
13 for the debtor but it would be helpful to hear it from you as
14 counsel for JPMorgan Chase.

15 And additionally, I've reviewed the statement which
16 you filed this afternoon. And there was one thing that I noted
17 that caught my eye and I'm interested in understanding a little
18 bit more about it. There was a reference in the statement to
19 Section 741 and the definition of securities contract and the
20 assertion that these documents all fit that definition. I'm
21 not quarreling with that assertion nor am I making a finding
22 now that the assertion is correct. But I'm interested in
23 knowing why that assertion is significant for purposes of the
24 relief that you're asking me to grant. And it may not be but
25 it caught my eye.

1 MR. NOVIKOFF: Okay. Your Honor, if I can put in
2 context why these advances were made, why it is that we are
3 seeking the comfort -- and first I should state for the record,
4 I'm Harold Novikoff of Wachtell, Lipton, Rosen & Katz. I'm
5 here with my colleague, Amy Wolf, on behalf of JPMorgan Chase
6 Bank, N.A.

7 As Mr. Krasnow indicated, JPMorgan is the principal
8 clearing bank for the domestic broker dealer, Lehman Brothers
9 Inc., as well as for some of the foreign broker dealers. The
10 way that Lehman Brothers Inc., the broker dealer, has
11 historically financed its dealer operations is that during the
12 course of a day, JPMorgan, under these clearance arrangements
13 which have been provided to the Court, provides intra-day
14 advances. At the end of the day, overnight financing is
15 provided by third party investors through what's called tri-
16 party repurchase agreement arrangements. Those investors are
17 principally mutual funds, money market funds, a whole host of
18 entities that are looking to either invest money overnight or
19 on a relatively short term basis.

20 On Monday morning, after the holding company had
21 commenced the Chapter 11 case, there was approximately eighty-
22 seven billion dollars that had been advanced by these various
23 investors and in the ordinary course would be -- they would get
24 their money back from an advance by JPMorgan Chase. And that
25 is the way this has worked for quite a while. JPMorgan Chase,

1 in theory, had the ability to say no, it's a discretionary
2 advance, we don't want to do it. But there was a great amount
3 of concern and that concern was expressed as well to us by the
4 Federal Reserve Bank of New York and just by knowledge of the
5 market that we would be creating market havoc had we not made
6 an advance at that time. So we did. So eighty-seven billion
7 was advanced. At the end of the day, a number of those tri-
8 party repo investors did not show up again and working with the
9 Federal Reserve Bank of New York, Lehman financed that position
10 overnight both with some tri-party investors as well as through
11 the primary dealer credit facility run by the Fed.

12 And then this morning, Your Honor, there was a
13 smaller advance had to be made for fifty-one billion dollars.
14 It became clear to us during the day yesterday, and we brought
15 this to the attention of Mr. Krasnow's partner, Mr. Miller,
16 that we realized that an argument may exist that because we
17 were making discretionary advances post-petition from the
18 perspective of the parent that there might be some argument
19 that we were effectively doing an extension of credit by the
20 parent.

21 THE COURT: Even though the money is going to a non-
22 debtor?

23 MR. NOVIKOFF: Absolutely. The money is going to a
24 non-debtor. And I'd like to point out, the advances we were
25 talking about are solely advances to non-debtors. It was

1 incorrectly reported in the press just a while ago that the
2 advances were made to the holding company. That's incorrect.
3 All the advances were made to non-debtor broker dealers.

4 Your Honor, we think the right result is that, in
5 fact, it does not amount to that but -- and it may be an
6 abundance of caution, but when you're talking about eighty
7 billion dollars or fifty billion dollars, it's difficult to be
8 overly cautious. So we did seek comfort from this Court right
9 away before we are doing more advances and we came to the Court
10 as early as we could with this. We wanted to come to the Court
11 so we knew that either -- so we knew that to the extent that
12 364 applies, what we're doing is authorized and we're not
13 violating anything. We are not seeking to change the status of
14 where things would have been had it still been pre-petition.
15 We are not seeking a validation of our liens. We are not
16 seeking a validation of the guaranty. We are not even seeking
17 administrative expense status. This is probably the only time
18 I will ever come to you post-petition and be able to say those
19 words.

20 THE COURT: And you've done it in front of a very
21 large crowd.

22 MR. NOVIKOFF: That's right. But JPMorgan, in these
23 circumstances, does want comfort that we are not violating the
24 law in doing that and that what's going on is authorized.

25 The reason we mentioned securities contract and,

1 frankly, these particular pleadings went through some
2 differences in formulation over time, when Your Honor takes a
3 look at the definition of securities contracts, BAPCPA in 2005
4 amended the definition of securities contract to include within
5 the long list of transactions that are covered are advances
6 made in connection with the clearance of securities. We think
7 that's exactly what this is. In addition, near the end of the
8 definition, you will see that what is included as a securities
9 contract includes security arrangements and guaranties made in
10 connection with a securities contract. So the parent guaranty
11 is itself a securities contract as is the security agreement
12 that governs that.

13 One item that we had thought about which deals with
14 this is the damages for termination, acceleration or
15 liquidation of securities contract, is different from what you
16 would normally see with a normal claim which would normally be
17 determined as of the petition date. In the case of a
18 termination of a securities contract, it's determined as of the
19 date of the termination. So under 562(a) of the Code, we think
20 also supports this but we did not want to simply rely on that
21 provision. But that's why there is some mention of that in the
22 papers. And we're not asking Your Honor for a determination on
23 that issue. We are really just asking for a determination that
24 with respect to the advances we made today, the large advance
25 that we will have to make tomorrow morning, the advance that we

1 will make the day after that, that we are effectively in the
2 same position that we would have been pre-petition, that is,
3 that it remains covered by the parent guaranty and by the
4 collateral that secures that guaranty. Whatever the legitimacy
5 of that guaranty, whatever the legitimacy of that collateral,
6 we are looking for that comfort.

7 THE COURT: Is there any objection by any party to
8 the relief sought by the debtor that has just been explained in
9 greater detail by counsel for JPMorgan Chase?

10 MS. LEVENTHAL: Your Honor, this is Shari Leventhal
11 for the Federal Reserve Bank of New York. We'd like to just
12 lend our support for the motion that has been made. And we
13 would note that we believe that the services that Chase has
14 been providing are critical to the smooth functioning of
15 financial markets.

16 THE COURT: And I am glad that was not an objection.

17 MR. KRASNOW: As am I, Your Honor.

18 THE COURT: That was that suspenseful moment when
19 someone stands and we're not sure what's going to happen next.
20 I believe that that -- Mr. Krasnow, do you have something to
21 add?

22 MR. KRASNOW: No, Your Honor. No, Your Honor.

23 THE COURT: I believe that a comfort order, as we're
24 characterizing it, for the benefit of JPMorgan Chase under
25 these clearance agreements, while unusual in my experience, is

1 entirely appropriate and consistent with the need to provide
2 market liquidity for this debtor and its affiliates during the
3 early stages of this bankruptcy case and beyond, for that
4 matter. And I'm perfectly prepared to grant the relief,
5 particularly since notwithstanding the short notice and a
6 packed courtroom, no one objects. And I'm confident that no
7 one, even after further deliberation, would object. I approve
8 that relief.

9 MR. KRASNOW: Thank you, Your Honor.

10 MR. NOVIKOFF: Thank you, Your Honor.

11 MR. WAISMAN: Shai Waisman for Lehman Brothers
12 Holdings Inc. Your Honor, that concludes the matters that have
13 been filed and with respect with which we seek to go forward
14 today. The events in the financial markets continue to occur
15 on a daily basis. And, you know, while Lehman Brothers has
16 succumbed to the distress in the market, it remains the fourth
17 largest investment bank and a significant player. It intends
18 to prosecute these cases to preserve, as I said earlier, value
19 to its customers and the value of its enterprise for the
20 benefit of all stakeholders, its employees included.

21 We have been in touch with chambers and do have a
22 tentative hearing scheduled for tomorrow at 11 a.m.

23 THE COURT: Yes.

24 MR. WAISMAN: We hope to get on the docket additional
25 pleadings, both administrative in nature and possibly more

1 substantive in nature, but that is yet to be determined. And I
2 believe people are working on that now. And obviously, it goes
3 without saying that as soon as we know anything, it'll be
4 reflected on the docket. It will be e-mailed and faxed to the
5 extent practicable to all of the parties-in-interest. And to
6 the extent we go forward with anything tomorrow, we will have
7 copies available here in Court for parties to review.

8 With that, the debtor has nothing further other than
9 to thank the Court for its time this evening.

10 THE COURT: That's fine. I noted that you chose your
11 words very carefully in describing what may happen tomorrow at
12 11 a.m. Just so you're aware of my calendar for tomorrow, I
13 have a 10:00 calendar that was previously listed for various
14 cases, before the Lehman Brothers case filed, at 10 a.m. I'm
15 hopeful that I will conclude that by 11:00. But I do note that
16 there is a lot of public interest in this case and for that
17 reason, would suggest that -- and I don't want to create a
18 crowd problem here -- that people not, in effect, file in to
19 try to get good seats while I'm in the middle of handling a
20 series of miscellaneous other matters. So I would propose,
21 even though it may create some traffic congestion, that people
22 come after 10:30 for the 11:00 hearing, assuming it's going
23 forward. And I also assume that you'll provide timely notice
24 to all parties if, in fact, there is no hearing.

25 MR. WAISMAN: As soon as we know, a notice will be

1 posted to the docket. And even if there is no hearing or as
2 soon as we conclude that there will be no hearing if that
3 should happen, a notice will be filed and that notice also will
4 be e-mailed and faxed to all parties-in-interest.

5 THE COURT: Fine. Just to let you know that you're
6 in the middle of a sandwich, I also have a 2 p.m. calendar
7 tomorrow. So we'll do the best we can with the schedules that
8 exist.

9 MR. WAISMAN: Absolutely. Thank you, Your Honor.

10 THE COURT: All right. We're adjourned for the
11 evening.

12 (Whereupon these proceedings were concluded at 5:58 p.m.)
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I N D E X

R U L I N G S

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C E R T I F I C A T I O N

I, Lisa Bar-Leib, certify that the foregoing transcript is a
true and accurate record of the proceedings.

Lisa Bar-Leib

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BCI EXHIBIT

48

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 08-13555

- - - - -x

In the Matter of:

LEHMAN BROTHERS HOLDINGS, INC., et al

Debtors.

- - - - -x

United States Bankruptcy Court

One Bowling Green

New York, New York

September 17, 2008

4:28 PM

B E F O R E:

HON. JAMES M. PECK

U.S. BANKRUPTCY JUDGE

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1 HEARING re Debtor's Motion Pursuant to Section 1015(b) of the
2 Federal Rules of Bankruptcy Procedure Requesting Joint
3 Administration of Chapter 11 Cases

4
5 HEARING re Motion for an Order Pursuant to Section 105(a) of
6 the Bankruptcy Code Directing that Certain Orders in the
7 Chapter 11 Case of Lehman Brothers Holdings Inc. be Made
8 Applicable to LB 745 LLC

9
10 HEARING re Debtor's Motion Pursuant to Section 105(a) of the
11 Bankruptcy Code and Bankruptcy Rule 1015(c) and 9007 Seeking
12 Authority to Implement Certain Notice and Case Management
13 Procedures

14
15 HEARING re Debtor's Motion to (a) Schedule a Sale Hearing; (b)
16 Establish Sales Procedures; (c) Approve a Breakup Fee; and (d)
17 Approve the Sale of the Purchased Assets and the Assumption and
18 Assignment of Contracts Relating to the Purchased Assets

19
20 HEARING re Motion for Order (i) Authorizing Debtor to Obtain
21 Post-Petition Financing Pursuant to Sections 363 and 364 of
22 Bankruptcy Code; (ii) Granting Liens and Superpriority Claims
23 to Post-Petition Lenders Pursuant to Section 364 of Bankruptcy
24 Code; and (iii) Scheduling Final Hearing

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P R O C E E D I N G S

THE COURT: Please be seated those who have seats.

I'd like to make an announcement which is totally unrelated to the substance of the hearing. It's related to our sound system. We discovered during yesterday's hearing and discovered again during the hearing that I had this afternoon in another case at 2:00 that the sound system is being adversely affected by BlackBerry use or other electronic devices. If you have one, even if you're not close to the podium, please shut it off. It's like you're on an airplane. Thank you.

MR. MILLER: Good afternoon, Your Honor. Harvey Miller from Weil Gotshal & Manges on behalf of the debtors in the two Chapter 11 cases of Lehman Brothers Holdings Inc. and LB 745 LCC. First, Your Honor, let me express the appreciation of the debtors and its professionals for all of your tolerance in accommodating all of our starts and stops over the last two days. This has been a very, very unique case in many, many respects, Your Honor.

Many years ago, John Greenleaf Whittier said "For of all sad words of tongue or pen, the saddest are those 'it might have been'." It's hard to find a place to begin to describe the events of the past week. There are lots of things that might have been but did not occur, Your Honor. If somebody would have said last Wednesday evening that -- it would have

1 been incomprehensible, Your Honor, to believe that an
2 organization that has been in existence for 158 years and has
3 become a worldwide leader in the financial community with over
4 25,000 employees would basically close its doors four days
5 later. The consequences of the economic and financial
6 conditions that all thought were contained in 2007 are a direct
7 cause of what has happened to Lehman Brothers, Your Honor.

8 For months, the company has been pursuing strategic
9 alternatives. The objective has been to protect the public
10 customers, preserve values and assist in avoiding the
11 deterioration of the financial markets. The parties to a
12 proposal which we think, Your Honor, will accomplish that
13 objective are the two debtors and the broker dealer subsidiary
14 Lehman Brothers Inc., Your Honor. And I might say, Your Honor,
15 there are 630,000 accounts having a value of 138 billion
16 dollars that are dependent upon the consummation of a
17 transaction which will allow this business to continue albeit
18 under the auspices of another entity. And since last Thursday
19 night, Your Honor, people have been working around the clock in
20 a Herculean effort to try and accomplish a transaction which
21 would protect the public interest, stabilize the public markets
22 and offer some assurance to employees. And I think, Your
23 Honor, if Your Honor had passed the Lehman Brothers building
24 last Thursday night -- or last Friday night, I should say, Your
25 Honor, and Saturday and watch the employees filling up their

1 suitcases and taking their personal belongings out of the
2 building, you would have seen the traumatic effect of what has
3 happened here, Your Honor.

4 So the question was how to save the value of the
5 franchise, protect the public customers and interest and
6 employees. The result, Your Honor, is a complex transaction
7 with many moving parts, some parts that are still moving every
8 single hour, Your Honor. Essentially, it provides for a sale
9 of the assets of the broker dealer, which I'll refer to, Your
10 Honor, as LBI. And that is the North American investment
11 banking and capital markets operation and supporting
12 infrastructure. It involves the two Chapter 11 debtors because
13 there are what I call related assets that provide the
14 infrastructure for the broker dealer. And the second debtor is
15 critical to the transaction because if the transaction, Your
16 Honor, is consummated, the purchaser will be buying that
17 building or the interest that the debtors have in that building
18 because there'll be a great need for space. The transaction
19 would allow the clearing of the moving of the accounts. It
20 would protect the public customers. And I have to say, Your
21 Honor, if the transaction is not consummated the notional cost
22 in connection with the transaction will be in the trillions.

23 The transaction, Your Honor, has been structured
24 because of the needs of the purchaser given the circumstances
25 in which the debtors find themselves and in which the broker

1 dealer finds itself. It is absolutely essential, Your Honor,
2 that the purchaser have the protections of Section 363 of the
3 Bankruptcy Code. The transaction, Your Honor, would
4 contemplate providing continued employment for almost 10 to
5 12,000 employees as part of this transaction for some period of
6 time. Some employees will be continued for much longer periods
7 of time but it will allow a transition, Your Honor.

8 So, how was the transaction structured? It was
9 structured, Your Honor, so that the two debtors would be
10 selling certain assets pursuant to Section 363 and in
11 connection with the broker dealer, Your Honor, in a very
12 unique -- and I don't think I've ever seen it done before.
13 There would be at a point in time, as the transaction moves
14 forward to conclusion, the commencement of a proceeding under
15 the Securities Investor Protection Act. And a designated
16 trustee would be appointed immediately and there would be, in
17 effect, Your Honor, concurrent hearings before Your Honor, I
18 believe, both in the SIPC proceeding and in the Chapter 11
19 cases for approval of the sale. In effect, we have used the
20 expression, Your Honor, of forward the pre-pack SIPC
21 proceedings. And I have to inform Your Honor that what has
22 gone on in the last four or five days -- it seems like one long
23 day -- is complete cooperation with the regulators, the
24 Securities and Exchange Commission, the Federal Reserve Bank
25 and the Securities Investor Protection Corporation, to agree on

1 a format which would accomplish the purpose of preserving all
2 these interests. And why is that so important, Your Honor? I
3 hate to use the analogy of a melting ice cube. It's been used
4 too often. So I'm just going to say this is a wasting asset.
5 It is extremely fragile and sensitive. And it's because of
6 that that people have been working around the clock. And it is
7 because of that, Your Honor, that the time, and we recognize
8 the time element is so tight that we are basically asking Your
9 Honor to set a -- sign a -- enter a sales procedure order which
10 will set up a hearing on late Friday afternoon. And the
11 coordination to get the time for the hearing on Friday
12 afternoon is very complex because it has to resonate with the
13 regulators. It has to be sufficient to allow the transfer of
14 all these accounts at the close of the market. And this
15 includes not only securities accounts, Your Honor, but
16 commodities futures accounts which is a very complex area.

17 It is a very complex transaction. As Your Honor
18 knows, the papers weren't filed till 6 a.m. this morning. The
19 negotiations -- and I want to tell you negotiations, Your
20 Honor, never stopped. People never went to sleep to get this
21 transaction. And why did they do that? Because of the
22 sensitivity of this transaction. And, Your Honor, just the
23 delay from yesterday, when Your Honor was kind enough to give
24 us a hearing date yesterday, to today has had negative
25 inferences by a great many people. Is there ever going to be a

1 hearing on this? That's why, Your Honor, we have come forward
2 today. We want to go forward. And I would point out, Your
3 Honor, we are not asking for any real substantive relief today
4 with respect to the sale motion. We are asking Your Honor to
5 set a hearing for Friday afternoon. And the only sensitive --
6 I'll call it somewhat sensitive issue is the approval of the
7 breakup fee.

8 Now, Your Honor, we are talking about a transaction
9 that has, as I said, many, many parts. But looking at it from
10 the net of this transaction, there will be approximately
11 1,700,000,000 dollars yielded out of this transaction.

12 UNIDENTIFIED SPEAKER: A billion.

13 MR. MILLER: I'm sorry?

14 UNIDENTIFIED SPEAKER: A billion.

15 MR. MILLER: You know, I always think of Senator
16 Dirksen, Your Honor. He said a billion here and a billion
17 there. Pretty soon you're talking about real money.

18 THE COURT: Well, you're talking about real money
19 here.

20 MR. MILLER: Absolutely, Your Honor. And so we have
21 1,700,000,000 dollars. There has been an enormous effort put
22 into this by the prospective purchaser, Barclays Capital, Your
23 Honor. And in the negotiations, quite properly, with all of
24 the efforts that they have put into it, there was a request --
25 I should say a request, almost a demand, for a breakup fee.

1 And there were negotiations in respect of that amount. And
2 what it came out to be, Your Honor, was a proposed breakup fee
3 of a hundred million dollars plus reimbursement of expenses of
4 up to twenty-five million dollars.

5 THE COURT: May I ask you a question --

6 MR. MILLER: Yes, sir.

7 THE COURT: -- about how to equate that breakup fee
8 and expense reimbursement with the purchase price? And I've
9 attempted to assess the notional value of the transaction
10 because in addition to the 1.7 billion dollars, there's a
11 reference to 1.5 billion dollars in cure amounts and possibly
12 as much as 2.5 billion dollars in certain employee related --

13 MR. MILLER: Yes, sir.

14 THE COURT: -- severance expenses which may or may
15 not be triggered. For purposes of my evaluating the fairness
16 of the overall proposed breakup fee and expense reimbursement
17 as a percentage of the transaction, not that I need to do that
18 but frequently Courts are viewed as approving breakup fees
19 within a certain market range. How should I view the fair
20 value of the overall transaction?

21 MR. MILLER: I think, Your Honor, if you start with
22 the billion seven hundred million dollars, which is the cash
23 component, as Your Honor obviously read in the papers, there
24 will be an exposure for 2.5 billion dollars in connection with
25 the retention of these 10 to 12,000 employees.

1 In addition to that, Your Honor, in connection with
2 the assumption and assignment of contracts, the cure amounts
3 and other payments in connection with the contracts, are
4 estimated to be a billion five hundred million dollars. So we
5 have four billion dollars right there, Your Honor.

6 In addition, Your Honor, the purchaser is paying 250
7 million dollars for the goodwill of LBI. So there you have
8 4,250,000,000 dollars in that respect, Your Honor.

9 And then, Your Honor, in the interim, LBI has entered
10 into an arrangement with the prospective purchaser where
11 there's a repo agreement in which they are backing up and
12 allowing these repos to be settled and to be financed. In
13 addition, if this goes forward, there will be a support
14 agreement for this interim period of two or three days where
15 Barclays Capital will be on premises, will be offering
16 oversight and in the sole discretion, may be willing to advance
17 some monies in the interim period.

18 So the problem we had, Your Honor, there are so many
19 different elements in this transaction that to do the usual
20 calculation of whether it should be two percent, three percent,
21 etcetera, became enormously complex during the course of the
22 proceedings. As Your Honor knows, as these transactions go up
23 in value, very often the breakup fee goes up in value. And
24 this -- if Your Honor just took the 1.7, I would say to Your
25 Honor, it's above three percent, clearly above three percent.

1 THE COURT: I know. I did the calculation.

2 MR. MILLER: Yes, Your Honor. But this is -- again,
3 I have to use the expression, this is such a unique
4 transaction. And there's been so much effort and there is so
5 much exposure. Senior executives at Barclays likewise, like
6 the rest of us slaves, never went to sleep from Sunday right
7 through last night.

8 So, I think, Your Honor, there's an extra quota of
9 consideration that has to be given in connection with this
10 transaction. And I would also bear in mind, Your Honor, that
11 what are the prospects of a competitive bid. This is such a
12 fragile asset. And it is not an asset that people did not know
13 was for sale. For months now, Lehman Brothers has been
14 pursuing strategic alternatives. The market has known that
15 aspects of Lehman, or even all of Lehman, were available for
16 purchase or investment. So that -- I'm not going to call it
17 shopworn Your Honor, but that the public, the financial
18 markets knew that these assets were for sale. And we had a
19 benefit, Your Honor. We were lucky because Barclays had been
20 negotiating to acquire Lehman. Unfortunately, that was one of
21 the things that might have been but never turned into fruition.
22 But as the part of that process, at least they had some
23 familiarity. And that was not a long negotiation either, Your
24 Honor. It was two days, basically. Unfortunately, because of
25 various regulations in the UK, that transaction could not have

1 gone forward. So we start at least with somebody who had some
2 knowledge. Otherwise, Your Honor, this wasting asset might
3 have been wasted. And unfortunately, Your Honor, and I'm not
4 trying to do the sale hearing now -- in court with us is Mr.
5 McDade, Herbert McDade, who is the president and chief
6 operating officer who, if he had to testify, Your Honor, would
7 testify that if this transaction is not approved, Friday night
8 there will be nobody in the building. And it will just
9 disappear.

10 So, I want to repeat, Your Honor. We're not asking
11 for a ruling on the sale today, Your Honor.

12 THE COURT: Well, let me just deal procedurally with
13 what's before me. And I know that you're in effect starting
14 with the sale procedures motion.

15 MR. MILLER: Yes, sir.

16 THE COURT: I was in early this morning and those
17 papers didn't make it to the ECF system until sometime after
18 7:30 --

19 MR. MILLER: Yes.

20 THE COURT: -- I didn't see them until about then.
21 And knowing the way those lawyers who don't work all night
22 behave, they often don't get to their offices until sometime
23 later than that. I have some concerns which I would like you
24 to address on the record. Recognizing that this is an
25 absolutely extraordinary transaction with extraordinary

1 importance to the capital markets globally, I still need to
2 deal with fundamental due process issues.

3 MR. MILLER: Yes, sir.

4 THE COURT: And I would like you to comment -- and
5 I'm not inviting objections on this basis. I'm just saying I
6 have a concern as to the adequacy of notice as to the substance
7 of the transaction for purposes of basic constitutional due
8 process.

9 MR. MILLER: Yes, sir.

10 MR. DESPINS: Your Honor, I'm sorry to interrupt. I
11 never do that but I thought that Mr. Miller was making
12 introductory remarks and therefore I wanted him to finish. But
13 on this issue, Your Honor -- first of all, let me introduce
14 myself. Luc Despins with my partner, Dennis Dunne, from
15 Milbank Tweed, proposed counsel for the official creditors'
16 committee.

17 THE COURT: That's okay. Debtors' counsel is
18 proposed counsel, too.

19 MR. DESPINS: Your Honor, we -- the committee has
20 concerns regarding -- I want to make sure the Court hears us on
21 that request. Clearly, we're not going to have a prolonged
22 argument over this but we request, and the committee wanted us
23 to request, a short adjournment until tomorrow morning so that
24 we can actually get up to speed and have an informed discussion
25 or -- or maybe not because maybe this is all -- maybe

1 everything that's going to be approved by the Court is
2 perfectly appropriate. But we want a short adjournment until
3 tomorrow morning. We were retained no more than forty minutes
4 ago, Your Honor. And this -- through no fault of the debtor.
5 This has nothing to do and we're not faulting the debtor in any
6 way. It's just that -- happened that way. But it's also
7 outside of our control.

8 So perhaps, in that context, Mr. Miller could, while
9 addressing your remarks, also address our request for a short
10 adjournment until your earliest convenience tomorrow, Your
11 Honor.

12 THE COURT: Okay. I'm sure he'll do that. But my
13 introduction to Mr. Miller was less about whether this hearing
14 should be held at another time and more about dealing with the
15 timing imperatives that confront the Court. I think everybody
16 needs to understand that I am personally disposed to doing
17 everything within my power to accommodating this transaction
18 within the limits of the law, the procedural rules and
19 fundamental due process. And all I am asking Mr. Miller to
20 address right now is my ability within my discretion, which is
21 remarkably broad, particularly at a time like this, to do
22 something extraordinary.

23 MR. MILLER: Your Honor, we could not agree with you
24 more about it being extraordinary. And I want to assure Your
25 Honor that we were very cognizant of the due process arguments.

1 And if we had the luxury of an asset that would stay in place
2 or a group of assets that would stay in place and would still
3 be there two weeks from now, we clearly would have done the
4 normal process of getting a sale procedures order entered,
5 having a period of time for people to get -- do whatever due
6 diligence they wanted to do. Our problem, and what we have
7 discussed at length, Your Honor, could we possibly do that and
8 still have a transaction? Would the purchaser stand by during
9 that period? And what would happen during that period? The
10 consensus among all of the business people, Your Honor, and the
11 professionals was there would be nothing to sell in two weeks.
12 This is really and truly a wasting asset.

13 So what we have tried to do, Your Honor, and as I
14 have said to Mr. Despins, we will stay up all night with him
15 and explain this transaction. Again, the only issue that Your
16 Honor has to decide today which has any significance at all is
17 the breakup fee. I'm not talking about the DIP. And set the
18 hearing. I know Your Honor came in early because Your Honor
19 expected to find the motion papers here.

20 THE COURT: Actually, I expected to find those papers
21 last evening. But it's all right.

22 MR. MILLER: I have to tell Your Honor, modern
23 technology is not all that it's cracked up to be.

24 THE COURT: I know.

25 MR. MILLER: And trying to get some stuff through a

1 computer is not so easy and to a printer. And there was a lot
2 of frustration and a number of statements "Well, I'm about to
3 commit suicide" but we didn't let that happen.

4 So we took that into recognition, Your Honor. And we
5 have sent them their websites. We have given as much publicity
6 as we can possibly give to this, Your Honor. And as I say
7 again, Your Honor, if it wasn't the unique nature of these
8 assets, the sensitivity of these assets and what has happened
9 in the marketplaces -- one of the purposes of doing this
10 transaction, Your Honor, is to try and soothe the markets and
11 to -- it'd be a counter force to the volatility that's going
12 on. I don't know if Your Honor has a screen in your office,
13 but if you watched what's happening to the market today, it's
14 dangerous.

15 THE COURT: Unfortunately, I was too busy to look at
16 any screens and I don't want to find out later. But don't tell
17 me now, please.

18 MR. MILLER: I'm not going to tell Your -- it would
19 depress Your Honor to know what's going on out there in the
20 marketplace. So we have taken that into account and we have
21 also taken into account, Your Honor, the extremely unique
22 circumstances that we find ourselves in. This is -- I don't
23 want to compare it to some -- in a small case, Your Honor, that
24 you and I may have been involved in twenty years ago where you
25 had a boat of salmon sitting out on the harbor and the company

1 in Chapter 11 had no money to unload it. That's the kind --
2 this is such a perishable asset that if we don't take this
3 action, due process -- nothing will matter. And I think, Your
4 Honor, everybody who has been involved -- and with due
5 deference to Mr. Despins and Mr. Dunne. They haven't been
6 fully briefed on it. But every other party who's been involved
7 has recognized that problem, including Your Honor, the
8 Securities and Exchange Commission, the Securities Investor
9 Protection Corporation and the Federal Reserve Bank.

10 Your Honor -- I have to tell Your Honor, there wasn't
11 an intention to file so quickly except what happened over the
12 past weekend. We would have had more time to deal with these
13 problems. And we understand what Your Honor is under in
14 connection with due process. But this has been so notorious.
15 I mean, we have filled up newspapers, we have filled up CNBC
16 and CNN with stories. We only got pushed off last night by
17 AIG. We would have liked to have had a portion of the eighty-
18 five billion dollars but we couldn't get it. So I think, Your
19 Honor, the proceeding is notorious.

20 THE COURT: I'm going to take judicial notice of the
21 fact that we have a packed courtroom where we have people
22 standing and we have an overflow courtroom, the fact that there
23 are parties represented by experienced and sophisticated
24 counsel, as evidence that there's no question that parties-in-
25 interest and parties who are just plain interested know about

1 today's hearing. And I've also had an opportunity to
2 understand through the press and television and the internet at
3 least some of the proposed terms and conditions of the
4 transaction. I think for that reason, I am inclined to
5 conclude that while this is unusual, and should not be viewed
6 as a precedent, I believe that here due process is satisfied
7 simply by virtue of the fact that we're all here together and
8 that we know what we're talking about.

9 MR. MILLER: I would only add to what Your Honor said
10 that yesterday was the organizational meeting called by the
11 Office of the United States Trustee which was in a ballroom at
12 the Park Lane Hotel in New York City. And if Your Honor had
13 been in that room, Your Honor would have seen an overflow
14 audience of people standing all through the hallway. So this
15 is a known situation, as Your Honor has pointed out. So we
16 really support Your Honor's ruling that there is adequate due
17 process.

18 THE COURT: Okay. So we've gotten over that hurdle.
19 Now, we have Mr. Despina's request on behalf of the newly formed
20 committee that has newly retained counsel to put this over for
21 a hearing tomorrow. I want to just comment that I have some
22 issues with respect to that because of my own calendar. But I
23 will attempt to address that if, in fact, after hearing
24 argument, if that's necessary, we need to adjust the timing.
25 But is this the time to debate that question? Or would counsel

1 benefit from a chance to confer? I'm prepared to do it either
2 way.

3 MR. MILLER: Your Honor, I think --

4 THE COURT: My only sense of this, based upon your
5 presentation, is that while I am sensitive to the needs of the
6 creditors' committee to have as much time as possible to
7 prepare whatever papers it may choose to file, including papers
8 in support of the transaction for that matter, I am also
9 conscious of the time line that you have outlined. And what I
10 consider to be the imperative that this transaction, if it is
11 to be approved, be approved before the end of the week. As a
12 result, the request not yet argued by Mr. Despins that this be
13 put over, that is, this aspect of today's hearing be put over
14 till tomorrow morning, raises in my mind an additional due
15 process question which is that the sale procedures and the sale
16 hearing are even closer together than they would be if I were
17 to approve the sale procedures today. So that while we take
18 away from the committee's time to respond to this procedural
19 motion by approving it, if I do, today, we also take away from
20 everybody's time to address the merits of the transaction if I
21 approve it tomorrow instead of today. So, that's the conundrum
22 that I face.

23 I am inclined not to grant the proposed request for
24 an adjournment for multiple reasons but I also don't wish to
25 cut off argument unnecessarily. The multiple reasons include

1 the following: one, I have a calendar tomorrow morning which
2 includes a number of other cases. And, at least in this court,
3 every case, regardless of size, is entitled to access to the
4 Court. And some of the cases that I'm hearing tomorrow are
5 quite large. Secondly, I believe that this very fast track
6 case needs to be addressed in an extraordinary way. And for
7 that reason, while I would, under ordinary circumstances, be
8 very sensitive to the request of committee counsel to have
9 additional time, and I've been in that spot myself when I was
10 in practice, I think that to delay the approval of the sale
11 procedures would send an intolerably awkward message to the
12 world. And I'm not prepared to preside over the delivery of
13 such a message. I believe that we should maintain the schedule
14 that we're on recognizing that it imposes some burdens on the
15 parties who need to appear and be heard. But I will also state
16 that for purposes of the sale hearing, I will be
17 extraordinarily liberal in allowing parties the ability to
18 object if they wish to at the very last minute as soon as we
19 call the hearing because I think that's also consistent with
20 due process.

21 MR. MILLER: Your Honor, we have no objection to
22 that. As far as we're concerned, Your Honor, you can extend
23 the objection date to the hour before whatever the time of the
24 hearing will be on Friday.

25 THE COURT: Since you offered that, that's what we'll

1 do.

2 MR. MILLER: Very good, Your Honor.

3 MR. DESPINS: Your Honor, normally and with short
4 deadlines like this, we -- I should say, sometimes the Court
5 dispenses with the filing of an objection, frankly. We can
6 make the arguments at the hearing.

7 THE COURT: As far as I'm concerned, every party-in-
8 interest who has a legitimate need to express a position on the
9 record will be free to do so at the sale hearing regardless of
10 whether papers have been filed of record consistent, however,
11 with providing some fair notice to the debtor of the kinds of
12 arguments that are going to be asserted. I don't think that
13 this is appropriately to be designed as a hearing by surprise.
14 So, as long as there is adequate notice, I think that would
15 work.

16 MR. MILLER: Absolutely, Your Honor. And anybody who
17 has an interest, Your Honor, can contact my office. We will
18 spend the time to explain things. We will set up meetings. We
19 are very sensitive to the due process argument, Your Honor.
20 And I agree with Your Honor. Anybody who has a statement to
21 make, if it's a substantive statement, we'd appreciate a little
22 notice of what it's going to be but it can be oral without any
23 problems.

24 THE COURT: I think you're entitled to that notice.
25 And I guess I'll be the only one surprised by what happens.

1 But as long as you know, I mean, if you're prepared, that's
2 fine.

3 MR. MILLER: Yes, Your Honor. And, Your Honor, if
4 Mr. Despins wants to debate the adjournment, if I may, I would
5 adopt all the reasons in the argument Your Honor is making.

6 THE COURT: You've always been a wise advocate.

7 MR. DESPINS: I think I'll pass on that, Your Honor.

8 MR. MILLER: Your Honor, if I could go back at this
9 point to the breakup fee, I would just note that if you took
10 the cash that's coming out of this transaction and you took the
11 cure amounts, the retention program, it comes up to 5.7 billion
12 dollars. A hundred million dollars, Your Honor, is
13 approximately two percent of that. Now, I grant you there's
14 some flex in those other two items. But given the enormity of
15 this transaction, Your Honor, from the debtors' perspective,
16 and we actively negotiated this, Your Honor, it's not an
17 unreasonable breakup fee. And if that's what gets the
18 transaction moving forward and as Your Honor pointed out, the
19 markets out there are very, very sensitive to what happens here
20 today. The employees are waiting. I mean, one of the things
21 filed -- I will withdraw. I was going to say something I
22 shouldn't say, Your Honor. The employees were going to come
23 down here en masse. It made me think of every time you have an
24 airline case, when the pilots are here. But we didn't think
25 that was necessary, Your Honor. There's just a lot of human

1 capital involved in this as well as the economic circumstances.

2 So we would ask Your Honor to approve the breakup
3 fee.

4 THE COURT: Before I do that, I can tell that there
5 are people who wish to be heard. I don't know if they wish to
6 be heard with respect to the limited question of the breakup
7 fee or whether they wish to be heard more broadly with respect
8 to the proposed bid procedures that you have on the table.

9 MR. MILLER: I was just going to go into the bid
10 procedures, Your Honor.

11 THE COURT: Excuse me?

12 MR. MILLER: I was just going to go into the bid
13 procedures.

14 THE COURT: All right. Well, there's someone behind
15 you who's obviously very pushy because she has made it to -- I
16 don't know who she is or why she's here in the middle of your
17 presentation. Who are you?

18 MS. SMITH: Your Honor, my name is Liz Smith. I'm
19 with Dewey & LeBoeuf and I represent the excess SIPC insured,
20 CAPCO Holdings and Customer Asset Protection Company which was
21 not involved in the process, has not been called, has not been
22 spoken to at all about what's going on here.

23 We don't object to the breakup fee but I do have a
24 limited objection to the actual terms of the proposed order
25 which I believe has been revised. And I was just shown it a

1 moment ago. And so I would like the opportunity before Your
2 Honor signs anything to discuss that with the debtor --

3 THE COURT: Well, let me make a statement which I
4 think applies broadly to other people who may be similarly
5 situated. Just in the interest of good order because we have
6 such a packed courtroom here today and many of the faces in the
7 room are familiar to me, many are not. I don't know yet who
8 everybody represents except for the principal players. And
9 it's entirely conceivable given the shortness of notice that
10 there may be comments that can be reasonably made to debtors'
11 counsel about the form of the proposed order. I don't think
12 this is the time to get into that unless it is a truly
13 substantive matter that requires the attention of everyone.
14 I'm not trying to cut off anybody's discussion time.

15 MR. MILLER: I would propose, Your Honor, if Your
16 Honor is to grant the motion that we would sit down -- Ms.
17 Smith?

18 MS. SMITH: Yes, thank you.

19 MR. MILLER: -- and anybody else --

20 THE COURT: Exactly my point.

21 MR. MILLER: -- and see if we can come up with a
22 consent order.

23 THE COURT: That's fine.

24 MS. SMITH: That would be ideal, Your Honor. Thank
25 you again.

1 THE COURT: Sure. And I think that what I'd really
2 like to find out because we have a fairly large and diverse
3 group of people is whether there are parties who represent
4 those who have complaints about the bid procedures, have
5 concerns about the bid procedures beyond the breakup fee and
6 beyond the timing because I have addressed the timing question.
7 The only questions that I think are really before me at the
8 moment are anything else that relates to the fairness,
9 reasonableness and appropriateness of my entering bid
10 procedures in the form proposed by the debtor obviously working
11 in concert with Barclays as the acquirer. So I'm prepared to
12 hear comments on that now if --

13 MR. MILLER: I would just describe very briefly the
14 bidding procedures, Your Honor.

15 THE COURT: Oh, that's fine.

16 MR. MILLER: Your Honor, this sales transaction was
17 originated and was negotiated in the context that this was not
18 the usual stalking horse kind of a transaction. That we were
19 fortunate in finding an entity which was prepared and had the
20 finances to acquire this as a going concern. However, we
21 wanted to -- we and the purchaser, Your Honor, wanted to
22 provide that in the event that at the sale hearing or before
23 that another bidder came along, experienced counsel
24 representing Barclays, Cleary Gottlieb, said we should be
25 entitled to some protection in connection with the bidding. So

1 the bidding procedures, Your Honor, are basically that the
2 first bid that would be made by a competitor has to take into
3 account the breakup fee and the reimbursement of expenses and
4 spend something. So the first overbid, Your Honor, has to be
5 175 million dollars over the 1.7 we're using as the base line,
6 the 1.7 billion.

7 THE COURT: You said 175?

8 MR. MILLER: 175 million, Your Honor.

9 THE COURT: My understanding was that the breakup fee
10 was a hundred million, that the expense reimbursement was
11 twenty-five million --

12 MR. MILLER: Right.

13 THE COURT: And is there then a fifty million dollar
14 minimum overbid?

15 MR. MILLER: That's correct, Your Honor. And then
16 the proposal, Your Honor, is the next bid, the increments of
17 bidding thereafter would be at a hundred million dollars with
18 the right to match -- right to match?

19 UNIDENTIFIED SPEAKER: Yes.

20 MR. MILLER: Yes.

21 THE COURT: I have a question based upon that.

22 MR. MILLER: Yes, sir.

23 THE COURT: I don't understand the rationale for a
24 fifty million dollar overbid. If there's a real player in the
25 game prepared to do everything that Barclays is doing and is

1 anxious for a competitive auction, why make it any harder for
2 that party to come into the process? I don't understand why we
3 should have a high hurdle.

4 MR. MILLER: Your Honor --

5 THE COURT: I'm just asking the question.

6 MR. MILLER: No. All I can say, Your Honor --

7 THE COURT: I'm assuming if I have the question,
8 others in the room might have it, too.

9 MR. MILLER: I will leave it open for comments, Your
10 Honor, but every time I have seen an overbid process, it's not
11 only to cover the breakup fee and expenses but there has always
12 been another increment on top of it. To be perfectly candor,
13 Your Honor, it is somewhat protective of the original bidder.
14 And if somebody's really interested in this, Your Honor, and
15 really wants to make a bid, I don't think that fifty million
16 dollars is going to make much of a difference.

17 THE COURT: All right. I understand your position.

18 MR. MILLER: So that's basically the bidding
19 procedures, Your Honor.

20 THE COURT: And when are bids due and how do bidders
21 who may be interested qualify to bid?

22 MR. MILLER: Your Honor, I'm going to take the same
23 tack that you previously stated. Anybody who wants to come in
24 at any time, we will entertain that. And again, I want to
25 repeat, I am offering my partners on a twenty-four hour basis.

1 THE COURT: Very generous of you.

2 MR. MILLER: So I don't know if there are any
3 comments on that, Your Honor.

4 THE COURT: Okay. Now that at least the broad
5 outline has been presented, is there anyone else who wished to
6 be heard on any of the substance?

7 MR. MILLER: I would just add, Your Honor --

8 THE COURT: Okay.

9 MR. MILLER: This is not --

10 THE COURT: You really are a hound for that, aren't
11 you? You're not giving up.

12 MR. MILLER: I just wanted to let the Court know that
13 the debtors have hired Lazard as its financial advisor and Mr.
14 Barry Ridings has been intimately involved in the construction
15 of the bidding procedures and involved in the negotiations of
16 the sales. And Mr. Ridings is in court here today, Your Honor.
17 Thank you, Your Honor.

18 THE COURT: Okay. Before you -- actually, now that
19 I've said what I said about not wanting to give up the podium,
20 I have a question for you and I want to ask it now even though
21 it's out of order. In reviewing the DIP agreement, I noted in
22 Section 5.16 that there is an obligation on the part of the
23 debtor to engage, Brian Marsal as CRO. I found that by
24 accident. It wasn't revealed in the motion itself. And I am
25 concerned, I'm letting you know this --

1 MR. MILLER: Yes, sir.

2 THE COURT: -- that it's probably an extraordinary
3 provision. I'm bringing it up now because there's also a
4 reference in the same long document to the hiring of a
5 financial advisor not identified by name, and now I know who it
6 is. I'm just alerting you, you don't have to comment now
7 because I think we should limit ourselves to the bid
8 procedures. But I'm concerned about that. I want to know more
9 about it. It seems to me to be a material provision that
10 wasn't disclosed. And there are event of default consequences
11 that appear to flow from his not being retained and kept on
12 board. I view that as an unusual provision and one that
13 because it limits my discretion is serious. So I wanted to let
14 you know about it, not sandbag you with the issue when you've
15 come up with the DIP, and be in a position to give me some
16 thoughtful remarks. And I'd rather not do it now. But I'm
17 just letting you know about it.

18 MR. MILLER: Very good, Your Honor.

19 THE COURT: Okay.

20 MR. DESPINS: May I, Your Honor?

21 THE COURT: Absolutely.

22 MR. DESPINS: Again, for the record, Luc Despins with
23 Milbank Tweed, proposed counsel for the committee. And this is
24 going to be -- I apologize. This is going to be a little bit
25 disorganized because we're getting up to speed at the hearing

1 literally. So there will be a series of comments and perhaps
2 questions that can be clarified. The first, and I apologize
3 for doing this, I want to clarify that the no-shop is gone. Is
4 that correct? That there's no no-shop provision anymore?
5 Okay. So therefore, the debtor is free to speak to any bidders
6 whatsoever. Okay. The other issue Your Honor identified is
7 the issue of the overbid. We don't think that a fifty million
8 dollar overbid is required under the circumstances and
9 certainly, not going forward always keeping a high overbid for
10 future bids.

11 Clarification, Your Honor, which is on the issue of
12 timing of Friday's hearing, if you're approving these bid
13 procedures today, will we be able to argue on Friday that the
14 sale should not proceed or that's -- besides the merits of
15 whether the sale is a good sale. Can we argue on Friday that
16 more time should pass between today and the actual sale hearing
17 or this is only going to be decided today and we are going to
18 be precluded from making that argument on Friday of this week.

19 THE COURT: Let me tell you what my reaction to that
20 is and others may have a different view. I decide one motion
21 at a time. I'm deciding the bid procedures motion and I'm not
22 inclined to grant your request for more time with respect to
23 approval of this particular request. On behalf of the
24 creditors' committee, you are free as to this matter and any
25 other matter that may come before me throughout the case to

1 appear and raise any issue that you consider appropriate under
2 the circumstances. I may not always agree with you but you're
3 free to raise it.

4 MR. DESPINS: Thank you, Your Honor. Then there are
5 issues related to the breakup fee, Your Honor. Putting aside
6 the size of it, and we'll come back to that in a minute, and
7 again, this may be plumbing and I apologize for bothering the
8 Court with this. But there's an issue over the trigger for the
9 breakup fee. I think in the motion it says that it's triggered
10 by another competing offer being consummated. And again, we
11 don't agree with the size of the breakup fee but that concept
12 is fine. But I want to confirm that if, for example, the
13 transaction is terminated because, for example, the Court does
14 not approve the transaction on Friday of this week, that it
15 will not cause the payment of any fees to the purchaser.

16 MR. DUNNE: We'll get right back to that.

17 MR. DESPINS: Okay. The next issue, Your Honor, is
18 the size of the breakup fee. Mr. Miller mentioned the fact
19 that there are cure costs. That doesn't go to the estate; it
20 goes to third parties. That's not, with all due respect, we
21 don't think it's appropriate, Your Honor, to consider that in
22 looking at the size of the breakup fee. What is relevant is
23 what is coming to the estate. What's coming to the estate, if
24 I understand correctly, is 250 million dollars plus the
25 appraised value of several properties. They believe that it's

1 going to be 1.75. . However, and again, maybe we misread the
2 agreement, it appears that the debtor is leaving behind in the
3 broker 1.3 billion of cash or cash equivalents. I could be
4 wrong on that but maybe that'll be clarified. If that's the
5 case, and again, I hope I'm wrong, then the -- what's happening
6 is that -- it's not 1.7. It's 1.7 minus 1.3. So again, we
7 apologize for raising this in this context. We would never do
8 that normally but we didn't have time to really --

9 THE COURT: Well, this is an extraordinary case and I
10 guess the benefit is Mr. Miller gets the opportunity to raise
11 things that he might not ordinarily raise given the timing and
12 so do you. So that's fine. Everything's open as far as I'm
13 concerned at this point. And I hear your arguments and some of
14 them -- I'm sure you'll be able to -- maybe we can take a break
15 at some point although it's going to be awkward to orchestrate
16 with this many people and you might have an opportunity to talk
17 a little bit with Mr. Miller or one of his volunteered
18 partners.

19 MR. DESPINS: Okay. So, Your Honor, putting aside
20 the 1.3 billion dollar argument, if you look at what the estate
21 is getting, it is really a breakup fee of a hundred million on
22 1.750 because it is a good thing for third parties that they're
23 getting paid by the purchaser. But that doesn't bring money to
24 the estate. So I want to make sure that that is not lost on
25 the Court. I think --

1 THE COURT: Well, I hear what you're saying but let
2 me tell you that at least in my experience, and I'm guessing in
3 yours, too, when considering the notional value of the
4 transaction, assumed liabilities are very often included and
5 avoided obligations are very often included for purposes of
6 determining the overall value. Certainly, when investment
7 bankers seek to be retained, they include everything they can
8 for purposes of their fee. And I'm assuming that what works
9 for one category in terms of sizing a transaction probably can
10 work for another. But I hear your argument.

11 MR. DESPINS: That would be correct, Your Honor, if
12 those assumed liabilities had to be paid by the debtor. But if
13 they're pre-petition claims that are going to be with all the
14 other pre-petition claims, I'm not sure that you can, without
15 knowing what the dividend will be on unsecured claims, we can't
16 determine whether this breakup fee is reasonable.

17 Before I conclude on this, I'd just like to confer
18 with my colleague, Mr. Dunne, for one second.

19 THE COURT: Sure.

20 (Pause)

21 MR. DESPINS: Your Honor, for now, I think that these
22 are our comments.

23 THE COURT: Okay. I don't know who else is here. I
24 can tell Mr. Goldman is coming forward with a look of maybe
25 wanted to speak to me. Do you want to speak to me, Mr.

1 Goldman?

2 MR. GOLDEN: Good afternoon, Your Honor. I'm sorry
3 we were late and I wasn't able to give the court reporter a
4 card. My name is Daniel Golden. I'm with the law firm of Akin
5 Gump Strauss Hauer and Feld. We represent an ad hoc
6 noteholders committee consisting currently of, but I anticipate
7 it to grow, the following institutions: Pacific Investment
8 Management Company, Western Asset Management Company, Black
9 Rock and Agon. And in the aggregate, these four institutions
10 hold over nine billion dollars of the debtors' bonds, some
11 senior, some subordinated, some junior subordinated bonds.

12 Your Honor, the problem my clients are having is they
13 just don't know whether this proposal, this sale proposal, is a
14 good one or not. It may well turn out it's a great one. It
15 may turn out it's the only one. But we're never going to know
16 under the debtors' proposed bidding procedures. These aren't
17 bidding procedures; these are Barclays' protection procedures.
18 They're not designed out to ferret out higher and better
19 offers. They're designed to ensure that nobody has -- no other
20 party has a legitimate shot to make a competitive offer.

21 Your Honor, this is an extraordinary case. Nobody's
22 going to doubt that. And I assume for as long as this case
23 goes on, people are going to talk about how extraordinary it
24 is. But Your Honor has recognized that due process doesn't go
25 out the window simply because it's an extraordinary or an

1 extraordinarily large case. And there are concerns that Mr.
2 Miller addressed and the debtors have addressed dealing with
3 the regulators and the employees. But what I haven't heard
4 whose interests have been protected by these proposed bidding
5 procedures are the creditors who, after all, should be the
6 beneficiaries of these proposed bidding procedures. Mr. Miller
7 said that these bidding procedures were negotiated aggressively
8 with Barclays. I'd like to see what happened if they weren't
9 negotiated aggressively.

10 I understand, and I'm sorry I was late again, that
11 they've taken out the absolute no-shop provision. Well, we're
12 thankful for that. But how real is that when a competitive --
13 a potential competitive bidder has less than two days to put in
14 a competing bid. We have heard no testimony whatsoever, no
15 evidence whatsoever as to who else the debtors have talked to
16 in the weeks and months leading up to this crisis, what other
17 bidders were out there, what opportunities other bidders were
18 given to obtain confidential information. So the fact that
19 there's not -- they've taken out the no-shop clause isn't
20 sufficient. And I understand, I'm not arguing, Your Honor, at
21 this point because I understand Your Honor has ruled that we
22 are going to go forward today at today's hearing on the
23 approval of the bidding procedures. But we think the bidding
24 procedures themselves are inherently unreasonable. One of the
25 provisions in the bidding procedures is that the debtor cannot

1 recognize a competing bid unless it's a "superior proposal".
2 And that's a defined term. And one of the things that makes a
3 competing bid a superior proposal is that it's for at least
4 1,875,000,000 dollars. And you heard Mr. Miller explain how
5 they got to that number. They took the Barclays base bid of a
6 billion seven. They added on the hundred million dollar
7 breakup fee, the up to twenty-five million dollar expense
8 reimbursement and then a little big of fifty million dollars on
9 top of that. The problem we have with that is the starting
10 point.

11 The purchase agreement does not provide that Barclays
12 is going to pay a billion seven hundred million dollars for
13 these assets. It provides that it's going to pay 250 million
14 dollars plus an appraised value for the company's headquarters
15 and two data center located, I think, in the state of New
16 Jersey. There is nothing in the papers that suggests how much
17 the building is worth or how much the data services are worth.
18 There's nothing in the papers that suggests what the appraisal
19 process will be, when it will be, how long it will be and
20 what's the mechanism. So, how in the world or why in the world
21 should the Court establish 1,700,000,000 dollars as the
22 Barclays bid. We have no idea as we sit here today other than
23 the debtors' representations that they think the Barclays'
24 proposal will turn out to be 1,700,000,000 dollars. So to
25 force a competing bidder to take that on faith and have to

1 compete by putting up not only the 1,700,000,000 dollars but an
2 additional 175 million dollars on top of that, we think is
3 unreasonable and was calculated to ensure there would be no
4 competing bids.

5 The bidding procedures provide that should a
6 competitive bidder make a "superior proposal", the debtors are
7 required to give Barclays forty-eight hours of notice so
8 Barclays can figure out what it wants to do with respect to
9 that competing superior proposal. Well, forty-eight hours
10 doesn't work with the debtors' time frame. So I don't know if
11 Barclays is willing to accept less notice or the debtors'
12 intent to extend the sale hearing. But their own provisions,
13 their own bidding procedures, don't work.

14 I understand, Your Honor, that the proposed September
15 18 deadline, tomorrow, to file objections has been removed.
16 And we think that's a good thing. The bidding procedures also
17 provide for matching rights. It's not clear the way they get
18 to that but they provide that Barclays has the absolute ability
19 to match any bid. It doesn't have to beat any competing bid;
20 it only has to match it. And that's always been a sore point
21 in bidding procedures. And we suggest that the matching
22 ability granted to Barclays is inappropriate and was designed,
23 once again, to chill competing bids.

24 For the very same reason that I talked about before
25 about what the Barclays bid really is, we don't understand the

1 calculation or the appropriateness of the breakup fee. We
2 don't know how much cash is actually going to be transferred
3 from Barclays to the debtors when this transaction closes or if
4 this transaction closes. And I do agree with Mr. Despins that
5 calculating the breakup fee as a percentage of the
6 consideration should definitely not include cure costs or saved
7 severance costs because that's not going to the debtors'
8 estate.

9 So I think, one, it's impossible to determine whether
10 the proposed breakup fee of a hundred million dollars
11 represents two percent, four percent, twenty percent.

12 THE COURT: It doesn't represent twenty percent, I
13 don't think.

14 MR. GOLDEN: Well, Your Honor --

15 THE COURT: But I hear you.

16 MR. GOLDEN: A couple more points, Your Honor. And I
17 know there's probably a lot of other people -- we understand
18 how fragile the situation is. And we don't stand here today
19 trying to scuttle the Barclays proposal. But Barclays, as the
20 proposed bidder, has dictated the time frames here. They have
21 dictated that the hearing must be Friday and that the absolute
22 closing date must be, I think, September 23. Everybody talks
23 about a melting ice cube. But there's just been no evidence,
24 no testimony, no anything other than attorney representations
25 as to the parade of horrors that would happen if there was

1 not the typical notice that you would have for a transaction of
2 this size. And maybe there is no typical notice for a
3 transaction of this size because there aren't many transactions
4 of this size that are generally approved by the bankruptcy
5 court.

6 THE COURT: I think this is the first precedent
7 actually.

8 MR. GOLDEN: Right. But give some reasonable notice
9 under the circumstances. We understand we're up against the
10 wall here. But that's not a problem of the creditors' making.
11 We weren't the ones who dictated the time frame for the Chapter
12 11 filing or for when they filed the motion for the sale or
13 when they filed the motion for the bidding procedures. And I
14 understand it may have been outside of everybody's control. Or
15 certainly not within the total control of the debtors. But,
16 Judge, give the creditors a break here. I mean, we need --
17 this is a big part of the debtors' asset base. We want to
18 ensure that if it's going to be sold to Barclays under this
19 proposed transaction that the debtors' estates are getting a
20 fair price for it.

21 There are some that suggest the building alone, the
22 headquarters on Seventh Avenue, may be worth as much as
23 Barclays is prepared to bid. We need to allow some shortened
24 but reasonable time frame to let this process play out so as to
25 determine with finality, so that nobody looks foolish, nobody's

1 embarrassed and that at the end of the day, everybody can say
2 we did the best we could under the circumstances, we got a
3 reasonable price for these assets and that nobody was taken
4 advantage of. Because if you read the bidding procedures as
5 drafted, if you understand the time frames as demanded by
6 Barclays and you understand the companion DIP motion which we
7 haven't even gotten to and presumably won't get to Friday, we
8 are very concerned that we will never know with certainty that
9 the estates were being fairly treated by this transaction.

10 We don't think we're asking for extraordinary relief.

11 THE COURT: What are you asking for?

12 MR. GOLDEN: Well, we are asking for an amendment of
13 the bidding procedures to deal with the issues I've raised
14 already. And we are asking for some modicum of time passed
15 Friday so that we can determine so that the committee, which
16 was just formed, presumably they've hired a financial advisor,
17 let the financial advisor speak to Lazard. Let the financial
18 advisor determine is there a third party out there that's
19 actually willing to compete for this transaction. Because
20 this -- with the glare of all the publicity that has shone down
21 upon this company over the last weeks and months, the last
22 thing we should be doing is going to a rush to judgment just to
23 get this asset off the blocks. Thank you, Your Honor.

24 THE COURT: Thank you. Mr. Mason?

25 MR. MASON: Thank you, Your Honor. Richard Mason,

1 Wachtell, Lipton, Rosen & Katz for JPMorgan Chase Bank. Your
2 Honor, I'll be very brief. I've heard counsel to the committee
3 and counsel to the ad hoc note holders. I believe, although I
4 haven't had the opportunity in this world to confirm this, that
5 my client might actually be the largest creditor of these
6 estates. I think, as Your Honor had heard yesterday, we
7 provided clearing advances starting on Monday for the
8 operations of the broker-dealer in the amount of eighty-seven
9 billion dollars. As of Tuesday, I think it was fifty-one
10 billion. I don't know what it is today but it's tens of
11 billions of dollars.

12 So I think our client is fundamental, in terms of
13 financing, to the operations of the broker-dealer. As Your
14 Honor knows, we have a guaranty claim against the holding
15 company secured by certain holding company assets or a secured
16 creditor in both places.

17 And what I could say about the timing, Your Honor, is
18 that I think, and I'm pretty sure my client thinks, that it is
19 urgent. I do believe that this is, as Mr. Miller has said, an
20 extraordinary situation. There is extreme sensitivity about
21 the timing of the sale hearing on Friday for some reasons that
22 we'll discuss with SIPC and the Fed, but it has to be carefully
23 coordinated such that if a sale hearing happens on Friday and
24 there's a bankruptcy of the broker-dealer prior to that time,
25 we need to make sure that the broker-dealer is financed and

1 that we're protected.

2 I know that in a normal circumstance a couple of
3 days' additional notice here and there for a sale hearing is
4 quite ordinary. I would be highly concerned, Your Honor,
5 although I'm not an expert in these matters, that if we're
6 trying to close a transaction on any day other than a weekend
7 day, it may be extremely difficult to do that. So that, I
8 think, might be one consideration that Your Honor would have
9 with respect to postponing a sale hearing, if Your Honor were
10 inclined to do so.

11 With respect to the process, given a recognition of
12 the urgency, we think it is quite incumbent upon the debtor,
13 and we understand that everybody has been working extremely
14 hard and it's been literally one long day for all of us since
15 Thursday, Friday or Saturday, but I think it's incumbent upon
16 the debtor, SIPC, the Fed and Barclays to get together in a
17 room with us in some fashion so that we can make sure, at least
18 as a process and financing matter, that if a closing is going
19 to happen on Friday or Saturday or Sunday, that it happen very,
20 very smoothly so that the operations are not interrupted. And
21 we're fully prepared, and I'm sure everybody else is prepared,
22 to do that.

23 With respect to the contract itself, Your Honor, we
24 very much appreciate your statement that objections can be,
25 frankly, lodged at the sale hearing. We'll give the debtor a,

1 as I tried to do before, before today's hearing, a condensed
2 notice of what our issues are. I'm sure we can work them out.

3 Just very quickly, among other things, we have a lien
4 on assets of the broker-dealer securing their tens of billions
5 of dollars in advances. And there's no clear statement in the
6 asset purchase agreement that once the assets are sold free and
7 clear really and we actually get paid there's a provision for
8 the sale and assignment of purchase contract. It would seem to
9 violate the provisions of the Bankruptcy Code that allow
10 parties to financial contracts, repos and the like to terminate
11 those contracts. I don't think that that was what was
12 intended. But there's an issue there. And the purchase
13 contracts really aren't even identified so people -- we're
14 going to be concerned about what's being assumed and what's
15 being left behind.

16 So hopefully we can work out all of these issues.
17 I'm sure we can. I think we all really need to work as quickly
18 as we have, unfortunately, in the past couple of days to try to
19 come to closure on these issues and, if Your Honor is to
20 approve a sale, to make sure that it actually happens very,
21 very smoothly.

22 THE COURT: I appreciate your remarks, but let me ask
23 a clarifying question.

24 MR. MASON: Yes, Your Honor.

25 THE COURT: On behalf of your client, recognizing

1 that you have reserved rights and talked about a process of
2 smooth coordination, do you have any objection to the bid
3 procedures?

4 MR. MASON: No, sir, Your Honor. I want to make that
5 clear. I have no objection to the bid procedures --

6 THE COURT: Fine.

7 MR. MASON: -- or to the break-up fee.

8 THE COURT: Fine. Just wanted to be clear on that.
9 Mr. Bienenstock?

10 MR. BIENENSTOCK: Good afternoon, Your Honor. Martin
11 Bienenstock, Dewey & LeBoeuf. I'm here representing several
12 clients not part of the group, just several clients: One is
13 Royal Bank of Scotland, which is a committee member; for
14 various reasons we discussed with the U.S. Trustee we're about
15 to start participating but have not so far; Bank of New York,
16 other than in its indentured trustee capacity; and The Walt
17 Disney Company.

18 The concerns that overlap all three go to Your
19 Honor's issue of due process and the break-up -- or the sale
20 procedure order in general. The nature of our claims, Your
21 Honor, and when I say "our" I mean all three clients I've
22 mentioned, is that we've done business, we've done trades with
23 subsidiaries of Lehman Brothers Holdings, direct or indirect.
24 There are losses in those trades, mostly now closed out, and we
25 have the guaranty of Lehman Brothers Holdings, unsecured

1 guaranty, backing up most of those losses.

2 So we have claims against subsidiaries that are
3 nondebtors, and we have a claim against the debtor. Royal Bank
4 of Scotland -- its claim, for instance, its gross claim on the
5 guaranties is between 1.5 and 1.8 billion.

6 The fundamental reason why I rose is to address the
7 due process issue of notice and hearing. It's implicit in both
8 that we're supposed to know what has been noticed and what is
9 being heard. And, again, through no fault of anyone, given all
10 of the exigencies that the debtor has explained, we found it,
11 at least during the hours we've had today, impossible to know,
12 from this asset purchase agreement, what the deal is in a way
13 that particularly affects us, specifically, is the debtor
14 selling assets of subsidiary nondebtors and saying to my
15 clients, who are creditors of the nondebtor subsidiaries, you
16 shall have no claim against Barclays, the purchaser, under
17 theories of successor liability, fraudulent transfer or
18 otherwise? Is it saying that?

19 And while I, in particular, very much appreciate the
20 offer to spend long hours with Mr. Miller's partners, it's
21 something I've done, and they're wonderful, what they say can't
22 change what this document says. This document talks about
23 purchased assets, excluded assets, excluded liabilities. And
24 then when you get into -- we'll call it the fine print, there
25 are parts of this document that says they can leave behind

1 contracts of subsidiaries.

2 Well, presumably, the ones that we have claims on
3 that resulted in lawsuits for my clients they would leave
4 behind. Or maybe not. Maybe they want to pay them. I don't
5 know. And I don't think there's anything the debtor's lawyers'
6 partners can say that -- I mean, it depends what the document
7 says. And this document doesn't -- read at its face it would
8 seem to say they can leave behind what is owed to my client,
9 those contracts, and we'll have no claim over it.

10 Now, if they're affecting a claim of my client
11 against a nondebtor subsidiary that it has against the
12 nondebtor subsidiary and would like to assert against the
13 nondebtor purchaser, two third parties who are nondebtors, it
14 creates Article 3 issues, Constitutional issues, whether Your
15 Honor can even hear that relief, grant that relief. We need to
16 know the answer, and the only way we'll know it is whether they
17 basically change the language to make it clear.

18 Now, one way they can do it is very simply to say
19 notwithstanding anything in this agreement or the proposed
20 order, nothing herein shall impair, release, extinguish claims
21 of creditors against the nondebtor subsidiaries and against the
22 nondebtor purchaser. We would like that. That would clear it
23 up quickly, and maybe if I thought a bit longer I'd slightly
24 change the language, but that's the notion.

25 But we have to know what Your Honor is being asked to

1 approve on Friday, or whenever this hearing is. And this
2 agreement, as it's written now, really creates things that we
3 would submit Your Honor doesn't even have jurisdiction to
4 grant.

5 Now, I want to point out emphatically that none of
6 the clients I'm here for today have decided to oppose or to
7 support this deal. We want to understand it first of all. We
8 think the Court needs to understand it to know if it's going to
9 have jurisdiction to approve it.

10 And bottom line: I think it's hard for me to imagine
11 that there should be one-offs of different creditors, parties-
12 in-interest of having different and probably overlapping
13 questions with the debtor's attorneys. Perhaps there could be
14 a session, as was done, for instance, in the Enron case.
15 Everyone was invited to speak to the real business parties to
16 ask their questions, to get them answered in a huge conference
17 room, so that we could at least understand what's going on
18 here.

19 That's fundamentally why I had to rise. Separately,
20 I do want to say that Royal Bank of Scotland completely
21 supports the creditors' committee position. There are
22 questions we have about the price that go beyond -- that even
23 go beyond, but I don't want to take the Court's time to get
24 into that. The Court probably knows what it wants to do on the
25 break-up fee and all.

1 And on the question of sympathies, if I heard the
2 debtor correctly, the debtor said if this isn't approved Friday
3 the employees are out the door. Well, if the employees are
4 saying to the rest of us they're leaving unless they get this,
5 we think that certainly changes the sympathies. We don't
6 really think -- we'll be pleasantly surprised, hopefully. We
7 don't really think the circumstances that exist allow for
8 competing bids. I mean, in this magnitude, serious companies
9 have to study the company, labor over the contract, talk to the
10 key employees. We don't think it's realistic in this short
11 time that's going to happen. The fact that Lehman was in the
12 press for a long time doesn't change that. Maybe we'll be
13 pleasantly surprised, and we hope we are.

14 We think the real question for the Court, whenever
15 this is heard, is go or no-go. It's based on the price, as was
16 already explained. And then when you look at getting in a
17 billion-seven hopefully -- but how much cash are you turning
18 over? Some press reports are talking in the billions. And why
19 is the company now wanting to borrow after turning over
20 billions? Why doesn't it just turn over less? That would
21 bring down the purchase price.

22 I mean, none of these questions are answered in the
23 papers. And, again, not to point fingers but they're just not
24 answered. And you can't have due process unless you know
25 what's being heard.

1 So, fundamentally, we would like all of the
2 businesspeople who have the answers to be available, not only
3 tomorrow but whenever this hearing is held, as witnesses so
4 that we can at least find out what the Court's actually being
5 asked to grant. Thank you.

6 THE COURT: Thank you, Mr. Bienenstock. Are there
7 others who wish to be heard?

8 MS. THOMAS: Your Honor? This is Stephanie Thomas on
9 behalf of the Pension Benefit Guaranty Corporation, on the
10 phone. I'd like to speak if everyone else there is done.

11 THE COURT: I can't tell if there's anybody else live
12 in the courtroom who wishes to be heard, but you have the
13 floor, so go right ahead.

14 MS. THOMAS: Okay. Thank you. PBGC is here today
15 because the lead donor in this case sponsored the pension plan.
16 The other pension plan owners, LBI, employs about nine or ten
17 thousand of the currently -- there's currently thirteen
18 thousand active participants. And LBI employs nine to ten
19 thousand of them.

20 It appears to us, from reading the asset purchase
21 agreement, that Barclays -- while they're hiring these
22 employees, they don't appear to be assuming the pension plan or
23 the pension liabilities related to these employees.

24 And Your Honor noted a little bit earlier that one of
25 the considerations in valuing an offer is to include the values

1 of liabilities assumed in the transaction.

2 We would like to just request that, in the event that
3 another bid comes in that is willing to either assume the
4 pension plan or the part of the pension plan attributable to
5 these employees, that the value of that, the value of the claim
6 that's being saved from PBGC having to terminate the plan would
7 be counted as part of that offer.

8 THE COURT: Request noted, and I'm sure that that's
9 something that will either be acceptable or not acceptable from
10 the perspective of the parties to the transaction.

11 MS. THOMAS: Thank you, Your Honor.

12 MS. LEVENTHAL: Good afternoon, Your Honor. Shari
13 Leventhal for the Federal Reserve Bank of New York. Your
14 Honor, the issue, as we see it here, is a timing question: How
15 quickly can this be done? And, with due respect, many of the
16 arguments that have been raised, we believe, are more
17 appropriate for Friday's sale hearing.

18 THE COURT: It's a useful preview for me, though.

19 MS. LEVENTHAL: Yes. At the New York Fed, we, like
20 many in this courtroom, have been working around the clock
21 since before last weekend. And as was widely reported in the
22 press, we started working around the clock in an attempt to
23 find a purchaser for Lehman.

24 And the sale process was widely reported, and what
25 was also widely reported is that there weren't that many

1 possible bidders. The number is very small. The number that
2 met the requirements in terms of financial capability and
3 regulatory qualifications -- we're not talking twenties, tens
4 even. We're talking one or two.

5 We believe that the timeliness here is -- the time
6 line that's been in place here is what is necessary, what is
7 required under these very, very unique circumstances. We're
8 looking, in terms of our mandate, at financial stability here,
9 and it is vitally important that this transaction go forward as
10 quickly as possible in order to preserve the financial
11 stability that, at this point, is already very fragile. Thank
12 you, Your Honor.

13 THE COURT: Thank you.

14 MS. BAMBACH: Your Honor, I'm Alistaire Bambach. I
15 am the chief bankruptcy counsel for the Securities and Exchange
16 Commission in New York. I'd like to make a few comments about
17 timing and the importance of the transaction. With me today is
18 my colleague, Dan Gallagher, who is the deputy director of our
19 Trading and Markets Division, who can address -- who can answer
20 questions specifically about the timing issue here.

21 As you are aware, the commission has a statutory
22 obligation to protect both the customers of the broker-dealer
23 and the public investors at the holding company level.

24 We strongly support this very, very important
25 transaction. It is in the strong interests of the investing

1 public. We have worked hand in hand in glove with the debtor,
2 with Barclays, and with the Fed to try to facilitate this
3 transaction over the last week or so.

4 We are hopeful that the transaction will move as
5 smoothly as possible in light of the many questions that have
6 been raised here today, but I think it's important that Your
7 Honor understand some of the timing issues that confront us,
8 confront the Fed and confront the debtor as we move forward.
9 And I'd like Mr. Gallagher, perhaps, to assist me in that, if I
10 may.

11 MR. GALLAGHER: I've been part of the team that's
12 been here with the Fed working hand in hand since late last
13 week and indeed with our chairman, sleeves rolled up, trying to
14 facilitate the deal that was on the table and then later
15 turning to this proceeding and trying to work with the
16 Securities Investor Protection Corporation, the firm, the Fed,
17 the CFTC to get this to a point where the firm would be in a
18 position to still be available Friday afternoon for a sale,
19 that has required extraordinary efforts by everybody involved
20 by the firm, Lehman Brothers, by their employees and the
21 regulators.

22 And I'm here not with a commission mandated statement
23 because, indeed, given the circumstances, we haven't gotten
24 formal commission approval even to be here, although they know
25 we're here. But we're here to just deliver the message that we

1 think it's critical for this to happen by the end of this week
2 also.

3 So I would support all of the comments already made
4 by my colleague at the Fed and my colleague from the
5 commission.

6 THE COURT: Thank you very much. Does the U.S.
7 Trustee wish to speak?

8 MS. ADAMS: Yes, Your Honor. Thank you, Your Honor.
9 Diana Adams, United States Trustee. Obviously, we're cognizant
10 of the unprecedented events that have been going on of the many
11 aspects of this case and the people involved and the
12 constituencies involved.

13 The constituencies are well represented in this
14 courtroom. The regulatory agencies that have just spoken to
15 the Court have seemed to have had the closest observation and
16 information as to the timing and what has been going on in the
17 past weeks. And I believe I have heard nothing that would
18 persuade me that they are not correct in their assessment of
19 the situation. And taking into account all of the
20 sensitivities that I know everybody in this room is well aware
21 of, we do support the position of the debtor in this case and
22 the regulatory agencies, Your Honor.

23 THE COURT: Thank you.

24 MR. DESPINS: Your Honor, please. I just had one
25 additional matter before Mr. Miller responds to all these

1 things.

2 THE COURT: Okay. I think, just in the interest of
3 good order, for future reference, without cutting anybody off,
4 I think we should have one opportunity for parties to express
5 whatever they have to express. And I'm going to give you a
6 mulligan. You can do it one more time.

7 MR. DESPINS: Of course, Your Honor. But as we
8 explained when we were retained, now an hour ago --

9 THE COURT: I understand, and you told me at the
10 outset that it was a little disorganized because of the
11 lateness of your retention, and that's fine. I'm just mindful
12 of the fact that this courtroom is packed and also --

13 MR. DESPINS: I understand.

14 THE COURT: -- extraordinarily warm.

15 MR. DESPINS: Okay. So I'll be brief. The DIP is
16 not before you right now but there is a link --

17 THE COURT: I think it is.

18 MR. DESPINS: No, no, but I'm saying it's not -- you
19 are not considering that right now. You'll consider it later
20 but --

21 THE COURT: Well, I guess it depends on how you
22 define "now". It's here before me today.

23 MR. DESPINS: Correct, but there is a provision in
24 the DIP document that says that if this agreement, meaning the
25 Barclays purchase agreement, is terminated by Barclays, the DIP

1 becomes due and payable.

2 So you could have a situation where -- let's assume
3 Your Honor, on Friday, decides "I'm not going to approve this
4 transaction at this time," what would happen is that if you
5 approve the DIP today the fees would be due, payable, etcetera,
6 and you would have to repay all of that plus the fee because
7 you didn't approve this transaction.

8 So I think it's important. It's one of these chorus
9 of provisions that you should be aware of. It's not -- again,
10 we're not discussing the DIP right now but it's linked to this
11 agreement, and I want to make sure you were aware of it.

12 THE COURT: I appreciate your pointing that out but
13 as you also pointed out, we're not discussing the DIP right
14 now.

15 MR. WASSERMAN: Your Honor, I'm Robert Wasserman, and
16 I am associate director in the division of Clearing and
17 Intermediary Oversight of the Commodity Futures Trading
18 Commission and also bankruptcy counsel for the commission. And
19 I just wanted to add that, in the interest of the futures
20 markets as well, this is a situation that really should be
21 dealt with as quickly as possible and that I support the
22 representations of my colleagues at the Fed and the SEC.

23 THE COURT: Fine. Mr. Miller, you're on again.

24 MR. MILLER: And, Your Honor, please, first, just to
25 alleviate the concerns of the PBGC, I am told, Your Honor, that

1 the pension fund is fully funded and there is no minimum
2 contribution that is due.

3 Your Honor, in listening to the presentations by the
4 various representatives of the creditors, they seem to have
5 lost cognizance of one thing: This debtor doesn't have any
6 money to operate without the total cooperation of JPMorgan
7 Chase, which settles those trades every night, which gives rise
8 to a liability of enormous proportions but which we don't have.
9 They have not taken into account, Your Honor, that just as of
10 yesterday there was a question as to whether we had enough
11 payroll to get through the day. And every single day as the
12 trades settle, there is a question as to whether we're going to
13 be short or we're going to be long.

14 This is not a Garment Center firm where you can sit
15 by and just wait while everybody goes out and looks for
16 bidders. This is an organization that, because of the
17 circumstances surrounding the filing, Your Honor, has no money.
18 It doesn't have the funds to operate without borrowing, and
19 who's giving the borrowing, Your Honor? Barclays. It's not an
20 eleemosynary institution. They're here to buy an asset, like
21 everybody else, and they're willing to support the debtor with
22 the DIP so they can get to a closing. That's a significant
23 thing, Your Honor.

24 So what -- Mr. Golden says we have plenty of time.
25 We don't have plenty of time. If this transaction goes away

1 Friday night, there is no more funding of anything, Your Honor.

2 We have a company, Barclays, which is supporting the
3 operations of LBI right now with a repo credit agreement so
4 they can settle the transaction. We don't have any sources of
5 funds, Your Honor. Nobody is sending cash to Lehman in the
6 settlement of the trades. They're demanding cash, yes. And
7 people have completely ignored out of this purchase price --
8 the biggest portion of this purchase price, Your Honor, goes to
9 the holdings corporation. That will give the holdings
10 corporation funds to administer the remainder of the assets.

11 Now, I'm a little bit shocked, having practiced with
12 Mr. Bienenstock for years, that he doesn't understand an
13 agreement.

14 THE COURT: Oh, he understands an agreement.

15 MR. MILLER: I think so. I think so. As far as --
16 we have a very large conference room, Your Honor. We could sit
17 down with a hundred lawyers or more. We'll bring the
18 businesspeople. That's not the problem, Your Honor. We said
19 we would do that, and we will do that. But what I want to
20 emphasize, Your Honor, is we have a problem with operations.
21 We don't have the funds. It's as simple as that.

22 THE COURT: Well, I'm going to cut through this at
23 this point. I think that I've heard substantially all the
24 arguments that could be made at a time like this about this
25 extraordinary transaction. And I think I've heard enough.

1 MR. MILLER: Thank you, Your Honor.

2 THE COURT: I believe that the work of lawyers, even
3 the best lawyers, under the pressure of time, necessarily is
4 imperfect but that the work product that has been created under
5 great pressure relating to the proposed sale of Lehman
6 Brothers' LBI asset to Barclays represents a transaction that
7 should be heard on the merits. We are not hearing whether or
8 not this transaction should be approved today. We are dealing
9 with a procedural bridge to a hearing to take place on Friday
10 afternoon.

11 I am satisfied, based upon what I have heard from
12 debtor's counsel, counsel for the various regulatory agencies,
13 JPMorgan Chase and others who recognize the critical timing
14 imperative that drives today's agenda, that this bid procedure
15 package, to the extent it can be improved, perhaps it can be,
16 but this bid procedure package, in one form or another, must be
17 approved today.

18 And I am bench ordering that it is approved subject
19 to such adjustments as may be required to accommodate some of
20 the changes that I've heard about only orally based upon
21 comments made that there are various changes. So the documents
22 in their form to be approved need to catch up with the
23 representations that have been made on the record.

24 The break-up fee has become a subject for discussion,
25 in part because it goes to the question of whether or not the

1 amount of the bid procedure relative to the fair notional value
2 of the transaction is so disproportionately large relative to
3 market that it shouldn't be approved as is. Mr. Golden made
4 the point in his remarks that it could be as much as twenty
5 percent. I, on the spot, disagreed with him. But what it does
6 point out is something that I think is apparent to everybody
7 who's observed this: It depends on how you count.

8 I'm not worrying about this as a percentage
9 transaction. Given the circumstances that brought us to this
10 point, I recognize that this was a negotiated number, not
11 necessarily designed to encourage bidding but a number which
12 nonetheless represents, depending on how you count, a
13 percentage that may be within market.

14 More importantly, while I would welcome the
15 opportunity to preside over a hearing in which some third party
16 within the class of one or two that may be in the zone of
17 potential purchasers for these assets, this is, for all
18 practical purposes, a private sale.

19 And while I don't mean to suggest that the notion of
20 bid protections and higher and better bids represents an
21 unreasonable, unrealistic or fanciful notion, I'm also
22 satisfied, based upon what I have heard, that there is
23 effectively one logical purchaser for these assets. That
24 purchaser has already identified itself, has been identified
25 publicly to the markets, has been identified publicly to the

1 employees and represents the continuity for this operation.

2 Those lawyers recently engaged by clients who would
3 seek to convert today's hearing into an opportunity for a more
4 traditional bid procedure, I think, missed the point. This
5 deal is the deal to be approved up or down on the merits when
6 we have a hearing on Friday.

7 If there is a surprise, and the events of the last
8 several weeks suggest to me that surprises are possible, and we
9 actually have another transaction to consider that is more
10 favorable and it's possible for that transaction to be approved
11 and to take place on what amounts to turning on a dime, the
12 smallest currency we'll ever hear in this case, I'm prepared to
13 allow for that possibility.

14 But I think we need to confront the realities of
15 today's hearing with a dose of reality. This is the
16 transaction that will allow for continuity of operation, absent
17 some extraordinary event.

18 The debtor will have a burden at the time of the
19 approval hearing to demonstrate the benefits to the estate
20 associated with the transaction. The committee will have a
21 full opportunity, as will other parties in interest, to address
22 the merits of the transactions, whether or not it represents
23 optimal value for all parties in interest. I recognize that
24 there are constituencies represented here that may not have
25 purely aligned interests, but it's also true that the employees

1 of this enterprise are parties-in-interest, that the value they
2 represent, in combination, well managed, provide services of
3 enormous value to the world economy. And I'm paying attention
4 to that.

5 As to the specifics of the bid procedures, to some
6 extent we are dealing with an adhesion contract. This is a
7 transaction that was negotiated by others and is being
8 presented in public. It's a nonnegotiable deal. I accept
9 that. If the circumstances were different, I might push back.
10 I'm not pushing back today.

11 Accordingly, I'm prepared to approve the bid
12 procedures, and I'm also prepared to suggest, since it's now a
13 minute past 6 and we have a large courtroom of people, some of
14 whom have been here since my 2:00 calendar today, that we take
15 a break in the action, assuming that we can all appropriately
16 reconvene in a timely way.

17 And just given the number of people involved, and
18 maybe the number of people who need to also confer, I'm going
19 to suggest a twenty-minute break. And I'll adjourn until 6:21,
20 22, more or less. We're adjourned till then.

21 (Recess from 6:04 till 6:59 p.m.)

22 THE COURT: Please be seated.

23 MS. SCHWEITZER: Good evening, Your Honor. I'm Lisa
24 Schweitzer from Cleary Gottlieb Steen & Hamilton, representing
25 Barclays. I understand we're now turning to the DIP motion.

1 In connection with the DIP agreement, Barclays and the debtors
2 have also entered into a separate letter that contains the fees
3 related to the DIP, and it also contains certain terms related
4 to a potential syndication of the DIP.

5 And as is customary or frequently done in these
6 situations, the parties agreed that we would share the terms of
7 those letters with the U.S. Trustee, the creditor committee.
8 And I hope that Your Honor has been given a copy of those.

9 THE COURT: I don't have it yet.

10 MS. SCHWEITZER: Okay. I understand it was being e-
11 mailed to you or to chambers. I'm sorry, a copy just went in.
12 I apologize. We're very short of copies right now, so -- Your
13 Honor, may I approach?

14 THE COURT: Well, I guess that keeps it confidential,
15 doesn't it?

16 MS. SCHWEITZER: Yes. May I approach, Your Honor.

17 THE COURT: You may. What about it?

18 MS. SCHWEITZER: So, in terms of this, what we had
19 discussed with the debtors is the contemplation that we have
20 presented to these entrusted parties, namely, the creditor
21 committee and the United States Trustee and Your Honor. And
22 the creditors' committee has raised certain concerns and
23 objections to the fees that are being proposed in connection
24 with the -- in the DIP, and --

25 THE COURT: Well, the fees aren't confidential, are

1 they?

2 MS. SCHWEITZER: Well, these -- the terms of the fees
3 are --

4 THE COURT: Why should they be?

5 MS. SCHWEITZER: Well, we would say that these are
6 competitively sensitive and also secondarily to fees --

7 THE COURT: I'm sorry.

8 MS. SCHWEITZER: But --

9 THE COURT: I'm sorry. It's a material term of the
10 DIP facility. This is a public hearing. I can understand
11 certain terms and conditions of the letter itself being
12 confidential but the amount of the fees? I'm sorry. That's
13 part of this record.

14 MS. SCHWEITZER: I understand, Your Honor. We would
15 intend to make it part of your record, and what we had proposed
16 is that the terms will be filed under seal. The second thing
17 that's in the --

18 THE COURT: Well, then you should have sought to file
19 those terms under seal before this hearing started.

20 MS. SCHWEITZER: Your Honor, we had contemplated
21 that, and we -- I apologize that we hadn't done that.

22 THE COURT: This isn't about apologies. It's about a
23 public hearing on incredibly short notice with giving everybody
24 who's interested in this very important transaction a fair
25 understanding of the essential economic terms. That's

1 different from a confidential fee letter. And I feel very
2 strongly that you're in the fishbowl of bankruptcy and it needs
3 to be disclosed.

4 MS. SCHWEITZER: Okay, Your Honor. Just to point out
5 to you, the second set of terms that are in the fee letter are
6 certain terms related to the syndication. And we had felt that
7 it was in the interest of the debtor as well as the lender to
8 keep those terms confidential because, in fact, if this
9 syndicated that could affect the ability to syndicate the loan.

10 THE COURT: I'm perfectly sensitive to the need to
11 keep certain terms and conditions of this document, which I
12 have not yet read, confidential to the extent that it
13 constitutes proprietary commercial information properly to be
14 sealed under Section 107, but there's been no showing yet that
15 any of that is true.

16 And as to the amount of fees payable in connection
17 with the transaction, it seems to me that's fair for reasonable
18 debate. And I'm trying to find out what you're trying to keep
19 confidential.

20 MS. SCHWEITZER: Um-hum. Well, I think that one of
21 the reasons that this loan is different than other loans is
22 that this loan is secured by one asset, which is the stock of
23 Neuberger, as opposed to a blanket on all of the debtor's
24 property.

25 THE COURT: Um-hum.

1 MS. SCHWEITZER: And so that this is a slightly
2 different loan than a typical loan. It's more as if you were
3 making a margin loan. And the pricing here is certainly --
4 many people would say margin loan pricing is competitively
5 sensitive and it would reveal, beyond just a DIP loan with
6 lender fees, that it's priced a different way. And, certainly,
7 we feel this is a market term pricing, and we negotiate quite
8 heavily and painfully with the debtors to come to these fees.
9 But Barclays would view that as different than setting a
10 precedent for every instance, being that every DIP lender is
11 entitled to hide its fees.

12 What we had proposed, Your Honor, and I think that
13 the debtors and the creditor committee would be in agreement
14 with this, is that if we could have an initial conference with
15 Your Honor where the committee would be able to raise their
16 arguments, then that we could raise our arguments and explain
17 how this was priced.

18 THE COURT: Doesn't work that way. This is a public
19 hearing. This is a public hearing, and absent a sealing order,
20 and there's no time for that, the world is entitled to know
21 what's going on here. If I know it and it's not truly
22 confidential information, and there's been no showing that it
23 is yet, it needs to be disclosed.

24 Now, if we're going to have a mini-hearing as to
25 whether or not the items in this letter, in fact, constitute

1 confidential information within the definition of 107, I'm
2 prepared to do that, if necessary, but I also question why this
3 issue, as opposed to all other aspects of this DIP facility,
4 now becomes the gating issue for purposes of one of the most
5 important transactions any of us have ever dealt with. Can't
6 we get into this? And then if, in fact, it becomes relevant to
7 deal with the question of confidentiality and you wish to press
8 the issue, we can, either because the committee is in agreement
9 that it doesn't have to come in, and we can finesse the issue
10 that way, but if it's part of this record and it needs to be
11 confidential, you're going to have to make a showing, with
12 evidence, publicly as to why this is confidential, and I will
13 then make a ruling. But otherwise, for purposes of this
14 hearing and for this entire case, we are not wiping out the
15 Bankruptcy Code. We are simply dealing with an emergency DIP
16 hearing which happens in virtually every Chapter 11 case.

17 So we're now not talking about an emergency sale. I
18 know it's connected. We're talking about DIP lending. And DIP
19 lending practice is governed by Rule 4001, Local Rule 4001-2
20 and by a set of procedures that involve public disclosure of
21 extraordinary provisions. The fact that you are spending the
22 time that you have spent on this issue suggests to me this may
23 be an extraordinary provision. Whether or not an extraordinary
24 provision should be kept confidential is something I deem very
25 serious, and I am not going to discuss it in a chambers

1 conference.

2 If it comes out, it'll be discussed on the record.

3 And if I conclude that it's confidential, we will then have a
4 confidential hearing in which I will, if necessary, clear the
5 courtroom. But you're going to have a heavy burden to convince
6 me.

7 MS. SCHWEITZER: Okay. Well, that's understood, Your
8 Honor. What I would propose, in light of the hour and the
9 circumstances and other things that are on the docket,
10 including the rest of the terms of the DIP, is if we could put
11 this to the end of the discussion of the DIP.

12 THE COURT: Let's do that.

13 MS. SCHWEITZER: Okay.

14 THE COURT: I think that's a fine idea.

15 MS. SCHWEITZER: Okay. So I'll defer to the debtors
16 on the rest of the DIP motion, if you'd like.

17 MS. FIFE: Yup. Good evening, Your Honor. Lori
18 Fife --

19 THE COURT: Good evening.

20 MS. FIFE: -- from Weil, Gotshal & Manges on behalf
21 of the debtors. You've already heard that this is the largest
22 and undoubtedly the most complicated Chapter 11 case.
23 Nevertheless, and perhaps surprisingly, the DIP financing,
24 which the debtors seek approval of today on an interim basis,
25 is thankfully straightforward and uncomplicated.

1 THE COURT: I thought that until now.

2 MS. FIFE: I still think that, Your Honor. The
3 debtor's management and its professionals have worked arduously
4 over the past weeks to develop a plan to consummate the
5 Barclays sale. It maximizes the value of their estates in
6 extremely trying times.

7 Right now, their ability to consummate that sale
8 transaction, however, is contingent upon this Court's approval
9 of interim financing in the amount of 200 million dollars.
10 Without approval of the immediate ability to utilize the 200
11 million dollars under the proposed DIP credit agreement,
12 Lehman's operations may cease as early as tonight. The
13 results, including on employees and the value of the estates,
14 would be catastrophic. The debtors would lose substantial
15 benefits of the Barclays sale and likely would not be able to
16 realize on substantial other sales that perhaps will occur in
17 the future. Ability to maintain the debtor's business
18 relationships with its customers, pay its employees and satisfy
19 its other critical operating expenses is essential to its
20 ability to survive. But, as indicated, this is a simple loan,
21 so let me just turn to the provisions of the loan.

22 It is the -- Barclays is granted a superpriority
23 administrative claim and a perfected first-priority lien on
24 unencumbered collateral, which is basically the debtor's
25 ninety-nine percent membership interest in the stock of

1 Neuberger Berman, which is a subsidiary of the debtor, Your
2 Honor.

3 The proposed financing does not affect the rights of,
4 or the collateral position of, the debtor's existing pre-
5 petition lenders, and therefore we don't have to deal with
6 adequate protection, use of cash collateral, finding or
7 anything of that nature, Your Honor.

8 The debtor was unable to obtain funds on an unsecured
9 basis, and they were also unable to find funds on any other
10 type of basis and essentially was led to the Barclays financing
11 by virtue of the sale transaction. They believe that the terms
12 offered by Barclays are significantly more favorable than any
13 terms that would have been offered by other lenders and that
14 such terms arise largely from the fact that Barclays is the
15 proposed purchaser.

16 The amount of the DIP is 450 million dollars, and it
17 consists of a 250 million dollar term loan and 200 million
18 dollar revolving credit facility. Up to 200 million dollars is
19 the interim financing we are seeking. The maturity date of the
20 loan is the earlier of six months after the closing date, the
21 termination of the asset purchase agreement and the
22 consummation of a sale of Neuberger Berman. Of course, the
23 stock is the collateral and, therefore, if we sell the stock,
24 then we have to use the proceeds to pay off the DIP facility.

25 The interest rate on the loan is LIBOR plus six

1 percent for the first sixty days and LIBOR plus seven and a
2 half percent for the period thereafter, or base plus five
3 percent for sixty days and base plus six and a half.

4 THE COURT: Does that increase in the interest rate
5 represent an intention on the part of the lender to encourage
6 refinancing or repayment within that period of time?

7 MS. FIFE: Yes, Your Honor. I think there's a belief
8 that the DIP financing will not be outstanding for more than
9 two months, actually.

10 THE COURT: So it sounds like it's being priced like
11 a bridge loan.

12 MS. FIFE: Yes, it is, actually. A bridge to a sale.
13 The proceeds of the DIP credit facility can be used to fund
14 post-petition operating expenses, costs and expenses of the
15 administration of the Chapter 11 case, working capital, capex
16 and other general corporate purposes but in accordance with a
17 cash flow forecast. There are variances, though, from the
18 forecast that the lender has allowed.

19 The DIP agreement has your typical covenants: reps
20 and warranties, events of default, nothing that I would believe
21 are out of the ordinary. I think that perhaps that one --

22 THE COURT: The one that I think is out of the
23 ordinary --

24 MS. FIFE: -- provision, Your Honor, that --

25 THE COURT: -- is the one that I found involving Mr.

1 Marsal.

2 MS. FIFE: Right.

3 THE COURT: And maybe there are others but that's the
4 one I found.

5 MS. FIFE: Yes, Your Honor. I have seen that in
6 other DIP financings but during the break we consulted with the
7 lender and they've agreed to take that provision out.

8 THE COURT: That takes care of it then.

9 MS. FIFE: But I will tell you, we do intend to
10 retain Alvarez & Marsal.

11 THE COURT: That's fine, and just so it's clear, I'm
12 not, for a minute, opposed to the notion of the retention of a
13 CRO, nor am I opposed to the retention of Mr. Marsal, with whom
14 I've had some dealings long in the past. My concern, and I
15 just want it to be disclosed, was that, first, the fact that
16 this provision was in the loan agreement wasn't disclosed in
17 the motion. I assume it was an oversight. Second, it would --
18 approving the facility with that provision in it would have the
19 effect of removing the Court's discretion, which is not only
20 impermissible under the guidelines, or at least extraordinary
21 under the guidelines, but completely unacceptable to me.

22 MS. FIFE: Um-hum.

23 THE COURT: And so I want it to be very clear that,
24 and that's why I highlighted it, that I'm raising it not
25 because I have any concerns as to either the decision to engage

1 a CRO or to engage Mr. Marsal as the CRO but rather that it be
2 a limiting provision on my discretion and that also is was
3 included in the document in a way that I think material but not
4 publicly disclosed.

5 MS. FIFE: I understand, Your Honor, and I do have to
6 apologize for not disclosing it in the motion. As you gather,
7 I'm sure, we have all been working --

8 THE COURT: You've all been dancing as fast as you
9 can.

10 MS. FIFE: Yes. And some people working with limited
11 facts, and it just was an oversight. So --

12 THE COURT: I understand completely.

13 MS. FIFE: -- sorry for that. I did want to address
14 Mr. Despins' question regarding the sort of cross-default and
15 an early termination. It's not a cross-default but the
16 termination, the tie-in between the DIP financing and the asset
17 purchase agreement. If, in fact, the asset purchase agreement
18 is not approved, we have thirty days after that date to
19 refinance the DIP facility. And that is something, Your Honor,
20 that we negotiated very hard for. The purchaser and the
21 lender, in this case the same party, really wanted that to be
22 an automatic termination and automatic repayment but we
23 insisted on getting at least thirty days to refinance.

24 However, in the event that we accept a superior bid,
25 then in that situation we do have to repay the loan right away.

1 But we believe that that was something that was fair because we
2 would take that into consideration in making a determination as
3 to whether it was a better --

4 THE COURT: It'll be part of the exercise of the
5 business judgment to accept an allegedly superior deal.

6 MS. FIFE: Exactly, Your Honor. So hopefully that
7 addresses Mr. Despins' issues with respect to that provision.

8 There is a carve-out, Your Honor, of six million
9 dollars, which probably is small in this case but the
10 collateral is only the stock, so hopefully there'll be other
11 unencumbered assets from which to get paid.

12 And I don't believe that there are any other
13 provisions in the agreement that are particularly unusual. So
14 what I would ask Your Honor is that you accept the statements
15 of Mr. Miller and myself as a proffer as to the circumstances
16 of the DIP financing. And given the tragic events that have
17 enveloped this enterprise in this highly unfavorable business
18 environment, Lehman really requires the approval of this
19 interim financing to maintain the operations, pay its
20 employees, service its customers and preserve value for the
21 benefit of these estates or creditors and all parties-in-
22 interest.

23 We are trying to make the best of a bad situation,
24 and without this DIP financing the debtor's employees and the
25 business is at real peril.

1 I'm happy to answer any questions, Your Honor.

2 THE COURT: A couple. First, I'm prepared to accept
3 the proffer but it's a proffer of the testimony of which
4 responsible officer of your client?

5 MR. MILLER: Presidents and chief operating officer,
6 Your Honor.

7 THE COURT: Fine. Is there any objection to my
8 accepting the proffer in lieu of taking testimony from that
9 witness?

10 MR. DESPINS: Well, Your Honor, the proffer is that
11 we believe these are the best terms we could have that we could
12 have gleaned. I mean, I really don't want to do this but they
13 haven't chopped this facility. So if they want to admit that,
14 that's fine. Otherwise, we'll put the witness on and --

15 THE COURT: I believe they did admit that in the
16 motion papers.

17 MS. FIFE: That's correct, Your Honor. We --

18 THE COURT: I think I saw -- I saw a clear indication
19 that --

20 MR. DESPINS: But then I don't understand --

21 THE COURT: -- while it wasn't chopped, it was
22 believed by the debtor that this was the best available
23 financing.

24 MS. FIFE: That's --

25 MR. DESPINS: Well, then, we'd understand the -- I

1 really don't want to do this but what is that belief based on
2 if they haven't talked to any other lenders other than the
3 entity making a bid for the assets? And you'll see when we get
4 to the fees, Your Honor, but -- I know that these are extreme
5 circumstances, Judge. We understand that. But if we're going
6 to say that and everything goes, that's okay but the fees that
7 are being charged here are off the charts. And so I don't know
8 how to proceed. I really don't want to go down that path but I
9 think, Your Honor, if -- I don't know what the basis --

10 THE COURT: By the way, there's no obligation to go
11 down that path. I mean, this is your professional judgment,
12 that you feel the need to go down that path. Whether that's a
13 smart thing do I leave to you.

14 But I'm just here to deal with this hearing as it
15 unfolds. If you feel the need to deal with this in the
16 representative of your constituency, and if you think it's the
17 responsible thing to do, obviously, in your professional
18 judgment, you will do what you think is necessary and I'll
19 preside over the hearing that develops. If you, after
20 reflecting, think that maybe it's not necessary, that's up to
21 you. I'm not telling you what to do here.

22 MR. DESPINS: Okay, Your Honor.

23 THE COURT: I take it that's an objection to the
24 fees.

25 MS. FIFE: I understand that, Your Honor.

1 THE COURT: And I think it -- but I'm not sure if
2 it's an objection to the proffer. I just want to --

3 MR. DESPINS: Well --

4 THE COURT: -- I just want to be clear --

5 MS. FIFE: Right.

6 THE COURT: -- procedurally whether or not we are now
7 going to have to call as a witness an officer of Lehman for
8 purposes of putting on the record background information
9 concerning the development of the DIP, alternatives to the DIP
10 and other fairly standard 364-type findings.

11 MR. DESPINS: Your Honor, if they're willing to
12 stipulate that there was no attempt made to retain any other
13 DIP, that's the first point; the second point, that this
14 witness is not testifying as to the reasonableness of the fees
15 that are being charged by --

16 THE COURT: I don't think there's been any assertion
17 made in the proffer as to the reasonableness of the fees.

18 MR. DESPINS: Well, okay, if there are none --

19 THE COURT: Well, it just --

20 MR. DESPINS: -- but there's no evidence.

21 THE COURT: -- it just wasn't part of the proffer.

22 MS. FIFE: Right.

23 MR. DESPINS: Okay. In other words, it was unclear
24 what the proffer was. I mean, I know there was a presentation
25 made to the Court. I didn't understand there was a formal

1 proffer. So if there is no testimony on the record as to the
2 reasonableness of the fees, we don't need to cross-examine.

3 THE COURT: Fine. Then we'll accept the proffer, and
4 there's no need for the witness to testify.

5 MS. FIFE: Okay. Then, with respect to the fees, how
6 would you like to proceed?

7 THE COURT: Well, I mean, here's really the question:
8 I need to know whether or not the amount of the fees or the
9 terms for paying the fees, and I haven't had a chance to read
10 the letter yet, are deemed confidential by Barclays, and if so,
11 why. And I need to have what amounts to a mini-hearing on the
12 subject of possible sealing because these are allegedly
13 proprietary and confidential business terms that should not be
14 part of the public record, recognizing, as I think I made
15 abundantly clear, my belief that sealing is the exception and
16 not the rule and that cause has to be shown.

17 If Barclays is prepared to put on such a record, we
18 can then have a chambers conference or some other procedure,
19 which may include clearing of the courtroom, for purposes of
20 presenting that information.

21 I would hope, and I don't know if this hope is going
22 to lead to a reality, that it may be possible to deal with this
23 issue without having to go through each of those steps. There
24 are a lot of very smart, creative and experienced lawyers in
25 the room, and one of the things I need to know is if, for

1 purposes of the interim DIP facility, I know going in that the
2 creditors' committee, upon reflection of a document that isn't
3 in evidence and that isn't a part of the public record, asserts
4 that these fees are, I'll use the term, excessive or
5 unreasonable, why do we need to go into the specifics of what
6 they are if I know what they are? Do they have to be part of
7 the record? Can't the creditors' committee make a perfectly
8 rational argument without having to have a whole hearing about
9 it since I've been given the letter? And you've been given the
10 letter, and others have been given the letter.

11 If that's not an acceptable approach, and I'm not
12 here to design the approach that's acceptable, I am simply
13 making a suggestion, then I think we do need to go into the
14 specifics of whether or not this constitutes confidential
15 information.

16 But given the incredible significance of this
17 financing to this incredibly significant case and the fact that
18 interim DIP facilities, in my experience, routinely are
19 granted, often with more onerous terms, forget the fees for a
20 minute, than we're talking about here, and given the fact the
21 DIP facility is being offered by the most likely acquirer of
22 the assets that we're talking about, is it really desirable to
23 convert this into a public display? I question the wisdom of
24 that. Everybody's free to do their job, but I think everybody
25 should pay close attention to what their job really is.

1 Mr. Despins, it's really up to you. And I'm not
2 trying to impose on you at all. You admitted at the outset
3 you're new to the case. You have a job to do, and I know
4 you're going to do it well. But do we really need to go down
5 this road?

6 MR. DESPINS: Your Honor, if Barclays agreed that the
7 only thing you're approving today is a very limited fee and the
8 rest is left for the final hearing, I'll just stand down and go
9 home. But my understanding, limited understanding, based on an
10 hour of having this document is that Your Honor would be doing
11 more today than that, and if it's not that, and I want to be
12 precise about -- it's not the issue what's payable today; it's
13 payable or earned.

14 So if Your Honor is only approving a limited fee,
15 whether it's payable or earned today, that's fine. We can
16 leave the rest for the final hearing. But if Your Honor is
17 doing more than that pursuant to this order, then, Your Honor,
18 I feel I have a duty to bring to the attention of the Court
19 that these are -- these fees are --

20 THE COURT: Well, you've done that. I know that the
21 creditors' committee, upon review of the fee letter, believes
22 that the fees, not yet disclosed publicly, are not market and
23 are, I'll use the term, excessive.

24 MR. DESPINS: Well, it's --

25 THE COURT: Is that what you think?

1 MR. DESPINS: Yes, but, Your Honor, for example,
2 there's a pre-payment -- I'm not going to talk about what the
3 fee is but there's a pre-payment penalty in here. If the
4 estate finds another source of financing, wants to pre-pay, X
5 percent is due to the lender. That's -- I'm sorry that you
6 said it but that's not a standard provision for a DIP financing
7 and --

8 THE COURT: Well, let me say that, and I'm not going
9 into the specifics of my own professional background before I
10 took the bench, but I have more than a passing familiarity with
11 DIP lending practice --

12 MR. DESPINS: Um-hum.

13 THE COURT: -- as a practitioner. And it's always
14 been about the fees, and it always will be about the fees.

15 And so without taking away anything from your
16 argument, I don't know, because I haven't read this yet, and if
17 you want me to I'm going to take a break and read it, there's
18 always a fee letter.

19 MR. DESPINS: Sure.

20 THE COURT: The fees are always something which
21 lenders deem to be confidential. However, they are typically
22 disclosed: unused line fees, facility fees, a whole host of
23 fees. I don't consider a pre-payment to be at all off-market.
24 Now, that just may be that I represented extreme lenders in the
25 past but -- and I may have, but I can tell you that I'm not

1 shocked to hear that that's part of this transaction,
2 particularly since there is an opportunity, if the deal fails,
3 to refinance it. And to the extent that somebody else comes
4 forward with a better transaction, there will be a need to
5 refinance this facility in a heartbeat. That's the pre-payment
6 risk that I consider reasonable for a lender to guard against
7 and to provide for in fees.

8 So we're talking about one little aspect of this, and
9 I don't mean to focus on it too much, but I'm telling you I'm
10 not yet shocked.

11 MR. DESPINS: Well, that's one aspect, Your Honor,
12 and also I'm sure you'll agree that when you look at the pre-
13 payment fee you have to look at the length of the loan. So if
14 you have a pre-payment fee that's due in twenty days, and
15 that's the same size of pre-payment fee and the facility that
16 has a two-year term, it's quite different.

17 And so, Your Honor, what I would ask the Court,
18 because I think the Court needs to know what the fees are, is,
19 I'm not going to describe the amount of the fees for now, we're
20 not going to go in to that, but to look at the letter and
21 basically -- in paragraph 1 of the letter there's one type of
22 fee, a facility fee. There's also a closing fee in that second
23 paragraph of paragraph 1. In addition to that, there's a pre-
24 payment fee and there's a syndication -- I'm sorry, there is a
25 market flex in paragraph 4, and I won't describe the amount but

1 it's in there. And I would ask the Court to look at the
2 totality of these fees.

3 THE COURT: Well, let's just say, for the sake of
4 discussion, Mr. Despina, that I would agree with you that these
5 fees are off-market. Let's just say that as a hypothetical.
6 Where are we going with that argument? Are we saying that I
7 should not approve the interim facility and I should set a
8 match to this asset because it won't be financed?

9 This is the only financing I'm here to approve. What
10 are you proposing?

11 MR. DESPINA: Your Honor, I don't have the
12 replacement facility today, given that I was retained a few
13 years ago. But if that's -- I mean, that's -- I understand
14 your point but in a lot of cases I'm involved in and when I
15 represent the secured lender and the Court finds the fees
16 excessive, they'll say I'm not going to approve those fees on
17 those terms, you need to do better than that. If you're not --
18 I'm not asking you to do that but my point is that is -- I have
19 experienced that myself, and the point here is if anything goes
20 because we're in a critical situation, then I --

21 THE COURT: Now, I totally disagree with that
22 assertion. We are not in an anything goes environment. We are
23 in an environment in which we're seeking to fit the exceptional
24 case within the standard framework that we're all familiar with
25 of due process, Bankruptcy Code, bankruptcy rules, the local

1 rules and accepted practice in this court.

2 And the only thing that's really different here is
3 that to not approve this facility doesn't just mean that the
4 hypothetical Friday payroll for the big Chapter 11 debtor is
5 not paid; it means that market participants everywhere,
6 globally, are materially adversely affected. I consider that
7 to be an exceptional circumstance and one in which it may not
8 be good practice to be worrying too much about whether the
9 facility itself is richly priced. It is the only facility.
10 And I am not going to convert this hearing into a public
11 renegotiation of the fee letter.

12 MR. DESPINS: Okay. Got it. You've heard me.
13 That's all I can say.

14 THE COURT: And you've heard me.

15 MR. DESPINS: Thank you.

16 MS. FIFE: With that, Your Honor, I'd ask you to
17 approve the interim financing.

18 THE COURT: Now, let me ask, because we have still a
19 reasonably packed courtroom, whether there are any objections
20 other than the ones that I've just heard and dealt with, I
21 think, to the approval of this facility, including issues with
22 respect to the proposed interim financing order or any other
23 aspect of this transaction, because I am not, just because it's
24 late and just because this transaction is critically important,
25 attempting to cut off anybody's ability to be heard.

1 MR. RIVERA: If I may, Your Honor, just very briefly,
2 Andrew Velez-Rivera for the United States Trustee. We have
3 less than a half a dozen relatively minor changes, and those
4 have been accepted by both the debtors and Barclays. So we're
5 taking care --

6 THE COURT: Very good. Glad to hear that. Mr.
7 Mason?

8 MR. MASON: Yes, Your Honor. Again, Richard Mason,
9 Wachtell, Lipton, Rosen & Katz for JPMorgan Chase Bank. Not
10 objecting to the interim financing. I'd just like to get a
11 clarification on the record. As Your Honor remembers and we
12 talked about previously, JPMorgan, pursuant to an order Your
13 Honor entered yesterday, has been making advances to the
14 broker-dealer secured by liens, securing a guaranty,
15 effectively, of the holding company. And I just want it to be
16 clear that those continuing advances, under that order, do not
17 constitute a violation of the DIP credit agreement. And, as I
18 think Ms. Fife had referred to before, the DIP lender is not
19 seeking a lien, priority, pari passu or subordinate, on our
20 collateral.

21 There are a couple of provisions that I think
22 technically could be read for that proposition. I just want
23 the record to be clear that's not the case.

24 THE COURT: Okay. Let's see if we can confirm that
25 right now.

1 MS. SCHWEITZER: Your Honor, Lisa Schweitzer from
2 Clearly Gottlieb. It was our understanding that we are not
3 priming anyone and that the collateral we were accepting was
4 the membership interest of Neuberger. So, just to be clear, I
5 don't understand JPMorgan to have a lien on that that we would
6 be priming. And so we were being represented that we were
7 doing a first-priority lien on that asset, but nothing else.

8 MR. MASON: That's correct. We don't have a lien on
9 that. And I just want to make sure that you don't have a
10 primings, pari passu or subordinate lien on our collateral.
11 You only have --

12 MS. SCHWEITZER: That's correct, Your Honor. So
13 we're all in agreement.

14 THE COURT: That's all been confirmed. Is everybody
15 happy now?

16 MR. MASON: Very, Your Honor.

17 THE COURT: Is there anyone else who wishes to be
18 heard with reference to the proposed interim DIP facility? I
19 have a question. There's a reference to a budget. I didn't
20 see it.

21 MS. FIFE: Sorry, Your Honor. It was being worked on
22 late last night, but I can provide you with it. One moment.

23 THE COURT: And my understanding is that advances
24 under the interim facility will be limited to 200 million
25 dollars but will be made in accordance with the budget.

1 MS. FIFE: That's correct, Your Honor.

2 MR. DESPINS: Your Honor, may we inquire because we
3 haven't seen the --

4 THE COURT: You absolutely should.

5 MR. DESPINS: The question is whether the maximum 200
6 will be available under the budget.

7 MS. FIFE: Will it be available under the budget?

8 MR. DESPINS: Yeah, the full 200 million available
9 under the budget.

10 MS. FIFE: Yes.

11 MR. DESPINS: Okay.

12 MS. FIFE: May I approach --

13 THE COURT: You may.

14 MS. FIFE: -- Your Honor?

15 THE COURT: Thank you.

16 MS. SCHWEITZER: This is, Your Honor, a proposed
17 budget, I believe, that has been discussed and with the
18 borrower -- I mean, with the lender. But I am now being that
19 the attorneys for the lender have not seen it, so if they want
20 to reserve that right to --

21 MS. FIFE: Right. I apologize. Right, I think we're
22 all on the same page, that we intend to have the debtor lend
23 against a budget. Just because of the standard negotiations,
24 we were given rough budgets but we hadn't finally signed off on
25 this particular budget. Maybe we've seen this, maybe we

1 haven't. This is the first time we have been handed this
2 document.

3 THE COURT: I'm really glad I asked this question.
4 It seems awfully important.

5 MS. SCHWEITZER: No, I think that's right. So just
6 to be clear is that the 200 million is available on day one.
7 There's a requirement that the debtor provide a budget and
8 provide cash forecasts and all the routine conditions. The
9 debtor -- we had not -- we have been given a budget, a
10 preliminary budget, to look at. So I think we all have an
11 understanding generally of where the money would be going to.
12 But because of the urgency and the debtor was just still
13 working on the budget that we hadn't finally signed off on the
14 form of the budget. I don't think that there's -- I don't
15 understand of any material disagreements about the terms. I
16 just wanted to note that I can't necessarily say this would be
17 attached to the agreement at this point.

18 MS. FIFE: But, Your Honor, I just confirmed that our
19 businesspeople and Barclays' businesspeople have reviewed that
20 budget several times. It's just that particular piece of
21 paper. So we will finalize it and submit it to Your Honor with
22 the additional changes that need to be made to the order.

23 THE COURT: Okay. I may have some edits to the order
24 before it gets entered. Has everyone who reasonably needs to
25 comment on the form of order had a chance to do that? I'm

1 going to take silence as "I don't know" instead of "yes".

2 MS. GRANFIELD: In terms of trying to conform an
3 order to some of the things that were said on the record
4 earlier, Your Honor, that's your question?

5 THE COURT: Well, actually, I asked a different
6 question, which is whether everybody who reasonably needs to
7 have input as to the form of order has had a chance to do so,
8 because this all happening very fast. And to the extent there
9 is anything who wishes to have input as to the form of order,
10 we're not going to do that while I'm sitting here.

11 MS. FIFE: No, I understand that.

12 THE COURT: But I think that there should be some
13 opportunity for people to meet, confer and wordsmith.

14 MS. FIFE: That's fine, Your Honor. There is one
15 issue though: that I believe we need to borrow tomorrow
16 morning.

17 THE COURT: So let's get it done now --

18 MS. FIFE: That's fine, Your Honor.

19 THE COURT: -- and recognizing that it's twenty to 8,
20 and in order to enter the order on the docket my chamber staff
21 needs to stay here. So it would be helpful, just from a
22 personal perspective, if we could be done within, say, the next
23 forty-five minutes.

24 MS. FIFE: We'll work as fast as we can, Your Honor.

25 THE COURT: I understand that. Now, there are some

1 miscellan -- Mr. Despins?

2 MR. DESPINS: Just briefly, Your Honor. I don't want
3 to beat a dead horse but there are findings in there that
4 there's no other financing available.

5 THE COURT: That's why you're going to have a chance
6 to meet and confer.

7 MR. DESPINS: Okay.

8 THE COURT: If there are aspects of this order that
9 the committee finds objectionable, rather than argue about the
10 language of the order now --

11 MR. DESPINS: Um-hum.

12 THE COURT: -- my suggestion is that you meet and
13 confer here in the courtroom and resolve those differences now
14 so that I can enter an order which at least includes -- you're
15 reserving all your rights, I recognize that, and I'm not
16 holding you to the language that you agreed to, but I'm giving
17 you an opportunity, which you can choose to accept or reject,
18 it's entirely up to you, to be part of the process of
19 developing a form of order.

20 MR. DESPINS: Thank you, Your Honor.

21 THE COURT: And when it comes to findings and
22 conclusions, I will be very careful to limit my findings and
23 conclusions to the record that's been made here.

24 Now, we had a number of miscellaneous matters that
25 were on the agenda as well, entirely, I think, routine and

1 noncontroversial matters, such as joint administration. And
2 Mr. Waisman's here so I guess I gave you the right cue.

3 MR. WAISMAN: Thank you for the cue, Your Honor.
4 Your Honor's correct. There were three other matters on the
5 calendar. We would consider them routine administrative
6 matters. As Your Honor is probably aware, another case was
7 filed last night, the case that Mr. Miller mentioned earlier,
8 LB 745 LLC. The first matter on the calendar would be a motion
9 to jointly administer the two cases for procedural purposes
10 only, not a substantive consolidation in any way. And we would
11 ask that that be approved at this time.

12 THE COURT: I grant that motion.

13 MR. WAISMAN: The next motion on the calendar, Your
14 Honor, because we had a hearing yesterday in the initially
15 filed case and certain orders were entered, we would like those
16 orders to apply to the debtor that subsequently filed last
17 night and an additional motion that was filed in the interim
18 gap period. So it's essentially a motion seeking that the new
19 debtor receive all of the relief that Your Honor granted
20 yesterday and today.

21 THE COURT: It seems to me purely procedural. Is
22 there any disagreement in regard to this? I hear none. I'll
23 grant that.

24 MR. WAISMAN: Thank you, Your Honor. The final
25 matter is a case management procedures motion, becoming fairly

1 in this district and being requested by the bench a great deal.
2 It deals with a number of issues, notices of appearance, master
3 service lists, service, omnibus hearing dates and the like, and
4 has been --

5 THE COURT: Before we get to that --

6 MR. WAISMAN: Yes.

7 THE COURT: -- the committee was just formed. I'd
8 like, before entering that order, to give Mr. Despins and his
9 colleagues an opportunity to check that out, unless he's
10 already done so.

11 MR. DESPINS: No, Your Honor.

12 MR. MILLER: I'm certain, not given Mr. Despins'
13 earlier statements, perhaps if there are no other objections we
14 can confer with the committee and submit it on consent --

15 THE COURT: You can.

16 MR. MILLER: -- later this week. The only other
17 thing, the Office of the United States Trustee has asked that
18 we incorporate the provisions of Rule 9070-1, that they shall
19 receive hard copies of all pleadings, and we will incorporate
20 that into the version that's submitted to Your Honor. And,
21 with that, we conclude the agenda. Thank you, Your Honor.

22 THE COURT: Okay. I want to make clear something
23 that was, I think, left unstated when we were dealing with the
24 sale procedures. In thinking about how to deal in an orderly
25 way with the hearing set for Friday afternoon, we concluded in

1 chambers that that hearing should be at 3:00, unless that
2 messes things up for the debtor or other parties, my concern
3 being that if we start later, given how we did today, it's
4 going to be very difficult for us to reach closure. Does that
5 work for you, Mr. Miller?

6 MR. MILLER: Your Honor, because of the process of
7 closing the transaction and consistent with a manner in which
8 accounts can be transferred and so on, it has been very
9 strongly suggested that the hearing not start till 4:00, Your
10 Honor.

11 THE COURT: Not start till 4:00?

12 MR. MILLER: Yeah.

13 THE COURT: In that case, it will not start till
14 4:00.

15 MR. MILLER: Thank you, Your Honor.

16 THE COURT: And, frankly, I believe that even if I
17 have listed it at 3:00, we would not start until 4:00. Is
18 there anything more for this evening?

19 MR. MILLER: We need to set a date for the hearing.

20 THE COURT: For the final?

21 MR. MILLER: Final.

22 THE COURT: You mean for the final DIP. When's that
23 going to be?

24 MR. WAISMAN: October 10th?

25 MS. SCHWEITZER: No. I think we moved it to the 2nd.

1 October 2nd is -- that's seventeen days out, which is the date
2 we had put in there and penciled. Well, Rosh Hashanah is
3 earlier that week, so it's after the holiday. We just want to
4 make sure that worked for your calendar because we haven't had
5 an opportunity to consult with your calendar.

6 THE COURT: I'm here.

7 MS. SCHWEITZER: Okay. Do you prefer the morning or
8 the afternoon?

9 THE COURT: I have a regular calendar that day, so we
10 better do it in the afternoon. I'd say -- let's do that one at
11 3:00.

12 MS. SCHWEITZER: 3:00.

13 THE COURT: All right?

14 MR. WAISMAN: Your Honor, I believe that concludes
15 the calendar. Thank you very much.

16 THE COURT: Thank you all, and we'll wait around
17 until we hear from you about the DIP.

18 ALL: Thank you, Your Honor.

19 THE COURT: And I am bench-ordering that approved.

20 ALL: Thank you.

21 (Whereupon these proceedings were concluded at 7:48 p.m.)
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I N D E X

R U L I N G S

DESCRIPTION	PAGE	LINE
Debtor's bidding procedures package approved	72	18
subject to adjustments according to		
representations made orally on the record		

C E R T I F I C A T I O N

I, Lisa Bar-Leib, certify that the foregoing transcript is a
true and accurate record of the proceedings.

Lisa Bar-Leib

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BCI EXHIBIT

49

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 08-13555

- - - - -x

In the Matter of:

LEHMAN BROTHERS HOLDINGS, INC., et al.

Debtors.

- - - - -x

United States Bankruptcy Court

One Bowling Green

New York, New York

September 19, 2008

4:36 PM

B E F O R E:

HON. JAMES M. PECK

U.S. BANKRUPTCY JUDGE

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2

HEARING re Debtor's Motion for an Order Pursuant to Section 105
of the Bankruptcy Code Confirming Status of Citibank Clearing
Advances

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6

HEARING re Debtor's Motion to (a) Schedule a Sale Hearing; (b)

7

Establish Sales Procedures; (c) Approve a Breakup Fee; and (d)

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Approve the Sale of the Purchased Assets and the Assumption and

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Assignment of Contracts Relating to the Purchased Assets

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P R O C E E D I N G S

THE COURT: Be seated, please. Do we really have standing room only at that spot? Okay.

MR. KRASNOW: Good afternoon, Your Honor. Richard Krasnow from Weil Gotshal & Manges on behalf of the debtors. Your Honor, I believe that there is no one in this crowded courtroom or the overflow courtrooms who has any interest with respect to the motion that is currently before the Court and that I will be addressing. Your Honor will recall that on Wednesday we sought a comfort order with respect to the functions that Morgan Guaranty -- Chase was providing as clearing agent. It provided them with comfort that the collateral that they then had would cover not only the pre-petition advances that they made as clearing agent but also those that occurred during the course of the case. What is before Your Honor this morning (sic) is essentially an identical motion but as to Citibank.

THE COURT: You've lost track of time. It's this afternoon.

MR. KRASNOW: This afternoon, Your Honor. Yes, I have. Your Honor, as I was saying, essentially the same as that particular motion. The order is essentially the same. The differences only result from the changes in facts: the numbers, the amount of collateral, the level of transactions that take place. The collateral is cash. There is no

1 determination being made in the order with respect to the
2 validity of the guaranties. There is no provision in the order
3 with respect to setoffs. Your Honor, we would rest on the
4 motion and request that the relief be granted.

5 THE COURT: There are no objections that have been
6 filed but this was an emergency motion. The courtroom is
7 packed. This is, for all practical purposes, a clone of the
8 very same relief that was granted the other day in favor of
9 JPMorgan Chase. Let me just verify that there are no
10 objections. Mr. Despins?

11 MR. DESPINS: Good afternoon, Your Honor. Luc
12 Despins with Milbank Tweed with my partner Dennis Dunne and
13 also Paul Aronson. Could we have -- not to indispose counsel
14 but could we have until the -- just an hour while the other
15 matter is proceeding so that we can confer with counsel just to
16 make sure that everything is not problematic? We don't think
17 there will be a problem, Your Honor, but we just would like a
18 little bit of time to --

19 THE COURT: Well, candidly, the reason that we're
20 doing this now is to dispose of something that was presumed to
21 be noncontroversial.

22 MR. DESPINS: And I think --

23 THE COURT: There's nothing that you've said that
24 tells me that it is controversial. But what I'm going to do is
25 approve it subject to your review of the form of order to

1 satisfy yourself that the relief being granted to Citibank is
2 as represented of like type to the relief that was granted to
3 JPMorgan Chase. Is that fair?

4 MR. DESPINS: That's fine, Your Honor.

5 THE COURT: Fine. That's what we'll do.

6 MR. KRASNOW: Thank you, Your Honor.

7 THE COURT: You may approach, if that's what you're
8 doing. I can't really tell. Frankly, with so many people in
9 the courtroom, whenever I see the movement this way, I get a
10 little concerned. Mr. Miller?

11 MR. MILLER: Good afternoon, Your Honor. It's sort
12 of difficult to believe, Your Honor, this is the fifth day of
13 this case. In terms of hours, I think we're in the sixth
14 month. In any event, Your Honor, as we described last
15 Wednesday, there are a lot of moving parts to this transaction.
16 And they've been moving with great velocity over the last days
17 since Wednesday. And as a consequence, Your Honor, there has
18 had to be some major changes in the transaction. And
19 unfortunately, they weren't finalized until about a half hour
20 ago. What I would propose, Your Honor, is that if Your Honor
21 will give us a recess for approximately a half hour so we can
22 explain orally to this audience --

23 THE COURT: Excuse me for one moment. Excuse me.

24 MR. MILLER: Going back, Your Honor, a recess for a
25 half hour so that we can orally explain to this audience the

1 nature of those changes and the significance. We think that
2 will expedite the hearing. One other thing, Your Honor, if I
3 might add, a large number of objections, Your Honor, relate to
4 cure amounts on the assumption and assignment of the executory
5 contracts, etcetera. The way it was set up, Your Honor, is
6 that if you did not object to the cure amount today, you were
7 bound by the cure amount. We're making a change in that, Your
8 Honor. All rights to object to the cure amounts and to
9 whatever resolution comes out of that, Your Honor, we are
10 extending to October 3 so that there's no -- if you have a
11 motion or an objection based on the cure amounts, you need not
12 be concerned about it today.

13 THE COURT: Does that mean that if there is a cure
14 objection that hasn't been filed prior to the commencement of
15 today's hearing that there's effectively a broad-based
16 extension for all such parties to file objections --

17 MR. MILLER: That is my impression, Your Honor.

18 THE COURT: -- on or before the 3rd of October?

19 MR. MILLER: That's my impression, Your Honor.

20 THE COURT: And is there any provision for a hearing
21 in connection with disputes regarding cure amounts?

22 MR. MILLER: Only if the parties don't come to an
23 agreement.

24 THE COURT: Fine.

25 MR. MILLER: Thank you, Your Honor. So I think that

1 if people have objections based upon that, they should be
2 somewhat relieved.

3 THE COURT: All right. And I'm sure if there are
4 questions during the break, they'll approach you or your
5 partners.

6 MR. MILLER: Thank you, Your Honor.

7 THE COURT: I think if a half hour is what you think
8 you need --

9 MR. MILLER: Yes.

10 THE COURT: -- why don't we say 5:15 with the
11 understanding that time has proven to be very flexible here in
12 the past this week. And it may turn out that we'll need a
13 little bit more time. But let's make that the holding time and
14 if there's a need for more, somebody should just knock on my
15 chambers door and let me know what's required.

16 MR. MILLER: Thank you, Your Honor.

17 THE COURT: Okay. We're adjourned until 5:15
18 provisionally.

19 (Recess from 4:43 p.m. until 5:41 p.m.)

20 THE COURT: Please be seated. I find myself in the
21 unusual position of being perhaps the only person in the
22 courtroom who doesn't know what everybody else knows because I
23 didn't hear what you told everybody. Do you want to tell me
24 anything?

25 MR. MILLER: Somehow, Your Honor, we knew you were

1 going to ask that question. So --

2 THE COURT: I hate to be that predictable.

3 MR. MILLER: There is a document -- maybe it'd be
4 better, Your Honor, if we do it orally.

5 THE COURT: Fine.

6 MR. MILLER: My partner, Ms. Fife, will do that. And
7 with some assistance from Ms. --

8 THE COURT: Let me just check on something because --
9 and this is purely technical. During the first phase of the
10 hearing, I was told that those people who are listening in
11 spillover courtrooms had a very hard time hearing me. I'm
12 having some difficulty as compared with our last hearing with
13 the amplification coming out of the podium. And I just want to
14 make sure that we're not suffering system overload. Okay.
15 That's on. And let me also make the announcement, whenever
16 anyone speaks for the record, this is always true here, but
17 given the number of people, please identify yourself before
18 speaking.

19 MS. FIFE: Thank you, Your Honor. Lori Fife from
20 Weil Gotshal & Manges on behalf of the debtors. Let me try to
21 summarize the changes that were made to the transaction. In
22 terms of the economic changes, they result largely because of
23 the markets, unfortunately. And from the time that the
24 transaction was actually entered into till now, the markets
25 dropped and the value of the securities dropped as well.

1 So, originally, we were selling assets that had a
2 value of seventy -- approximately seventy billion dollars. And
3 today, Your Honor, we're only selling assets that have a value
4 of 47.4 billion dollars.

5 Barclays is assuming liabilities, however, of 45.5
6 billion dollars in connection with those assets. So that has
7 not changed from the original transaction. There was an upside
8 sharing in the original transaction. There was going to be a
9 true-up twelve months later on and that has been eliminated
10 from this transaction.

11 Barclays is still agreeing to pay the cure amounts on
12 any leases that it assumes or that we assume and assign to it.
13 Barclays is also agreeing to the same employee compensation
14 arrangements. And it is also agreeing to pay the 250 million
15 dollars of goodwill to LBI.

16 With respect to the real estate assets, Your Honor,
17 that was -- we had said at the last hearing, I believe, it was
18 approximately a billion dollars. Since that time, an appraisal
19 has come in and it is below that amount. The contract had a
20 provision which allowed the purchaser really to purchase the
21 building at the appraised amount. So we have some negotiations
22 to go, but I believe that the purchase price will come down by
23 approximately a hundred million dollars.

24 There were two other real estate properties also
25 which we received appraisals for which, similarly, were lower

1 than we had anticipated, unfortunately. So I think,
2 cumulatively, we're expecting that the purchase price will come
3 down by a hundred to maybe 200 million dollars for the real
4 estate.

5 Some other changes that were made to the contracts
6 affect what are called purchase assets and what are excluded
7 assets. There was some confusion as to which subsidiaries, if
8 any, were being sold. And we've clarified in a clarification
9 letter which we're hoping to finalize and actually present to
10 Your Honor whenever it comes down here. But in that letter,
11 we're going to clarify that the only subsidiaries that are
12 being purchased by Barclays are Lehman Brothers Canada Inc.,
13 Lehman Brothers Sudamerica SA and Lehman Brothers Uruguay SA.
14 The latter two subsidiaries that I just referred to relate to a
15 business that is called PIM, or Private Investment Management
16 Business, which is a business that was not part of the original
17 deal but is now being purchased by Barclays.

18 THE COURT: For no additional consideration?

19 MS. FIFE: That's correct, Your Honor.

20 THE COURT: And what's that business worth?

21 MS. FIFE: It's essentially just people, Your Honor.

22 It's the high net worth individual brokerage business. And
23 it's really just the people who are in those offices.

24 THE COURT: And their rolodexes.

25 MS. FIFE: And their rolodexes, exactly. The

1 customer accounts were being transferred anyway.

2 There was a change that was made to the license of
3 the Lehman Brothers' name. It was perpetual. It is now two
4 years but we don't really believe that that's a problem. The
5 IMD business, which is essentially Neuberger Berman and some
6 other related entities, will have a perpetual license to use
7 the name.

8 There was a provision in the old agreement pursuant
9 to which the parties were sharing the residential real estate
10 mortgages. There is no longer that provision. Barclays was
11 required to post collateral, actually this morning, in order to
12 get DTC to open up trading. And that collateral was posted --
13 the residential real estate mortgages was posted to DTC.
14 Pursuant to this transaction, Barclays is taking over and
15 guaranteeing all of those transactions. And they are assuming
16 the risk related to those transactions so that collateral will
17 remain with Barclays.

18 THE COURT: What's the aggregate value of the posted
19 collateral?

20 MS. FIFE: One second, Your Honor.

21 (Pause)

22 MS. FIFE: Your Honor, I'm not -- excuse me? There
23 are 300,000 trades but we're not sure the value of the
24 collateral. Perhaps during the rest of the hearing we can find
25 that amount out for Your Honor.

1 THE COURT: Okay. I'm not entirely sure I'm
2 understanding the overall impact of the change in the sharing
3 of the residential mortgage collateral and whether or not that
4 constitutes a benefit to the estate or a detriment to the
5 estate. Which do you think it is?

6 MS. FIFE: It's hard to tell. It depends on which
7 way those trades come out. But we believe it's a benefit to
8 the estate because it allowed trading to continue this morning
9 because DTC and NASDAQ were unwilling to allow Lehman to
10 continue trading without this posting of collateral which was
11 very important to the company, obviously. So we were able to
12 work out this arrangement whereby Barclays would stand behind
13 the trades. It is the debtors' belief that it's a necessary
14 part of the transaction.

15 THE COURT: Okay. And I realize I'm asking a lot of
16 questions about things that may have been fully explained when
17 I was in chambers, but Barclays' undertaking to stand behind,
18 as you put it, this posted collateral, how is that documented?
19 And what happens in the event that the transaction that we're
20 now talking about is not approved or is delayed?

21 MS. FIFE: It was documented in the First Amendment
22 to the asset purchase agreement, which we actually do have and
23 if the transaction is not consummated -- I'm actually not sure
24 of the answer, Your Honor. I'm sorry. I believe Barclays is
25 liable. Oh, okay. So, I'm advised by my partner that if the

1 transaction's not consummated then the transactions -- all the
2 trades come back to Lehman, and Lehman is then responsible for
3 them. Excuse me for one second, Your Honor.

4 (Pause)

5 MS. FIFE: I'm being told that if the liabilities are
6 less than the collateral then the excess collateral comes back
7 to Lehman.

8 THE COURT: And if the liabilities are greater?

9 MS. FIFE: We have no further obligation.

10 THE COURT: Okay.

11 MS. FIFE: We also modified the agreement -- would
12 you like the representative from DTC to explain that in more
13 detail, Your Honor?

14 THE COURT: Mr. Hirshon, I'd be happy to hear from
15 you.

16 MR. HIRSHON: Good afternoon, Your Honor. Nice to be
17 before you. Sheldon Hirshon, Proskauer Rose, representing the
18 composite -- the trust clearing corporations. Your Honor, the
19 essence of the transaction is to move all of the accounts
20 seamlessly from Lehman to Barclays. What DTC does is the
21 plumbing of that and handles all of the details in the settling
22 of the trades.

23 THE COURT: Is that how they describe themselves?

24 MR. HIRSHON: That's how I describe them because
25 until Sunday, I didn't understand any of this. But it is what

1 spigots get turned on and off and how the pipeline is filled
2 and then emptied. So each day -- there are several different
3 clearinghouses. And each day the trades are matches and then
4 either a net number goes to Lehman or from Lehman to DTC or any
5 of its clearing companies. There was a depository that holds
6 all of the securities. The residential mortgages that you've
7 heard about that were going to be split fifty/fifty are in the
8 DTC registry. We hold them now. They are there. Originally,
9 the idea for the original transaction was to split those
10 fifty/fifty between Barclays and the estate. But in order to
11 facilitate the settlement of these accounts, the additional
12 fifty percent was needed so that DTC would not be at risk for
13 the settlement. So the --

14 THE COURT: So this modification principally is for
15 the benefit of your client?

16 MR. HIRSHON: Correct. And for the transaction,
17 because without it trading would have stopped. There would be
18 no business to sell because there would have been no -- no
19 trades cleared today. So it was to facilitate the transaction
20 as a friend to the transaction that this was done so that the
21 business continues to operate today. Now, the arrangement is
22 that the whole six billion dollars of residential mortgages
23 will be there and subject to settlement. But the anticipation
24 is that once all these claims settle, the trades that are from
25 Wednesday through Monday settle, there will not be a need for

1 all of that collateral. So what the amendment to the APA says
2 is that the fifty percent will be returned, as long as it's
3 there. If something really terrible happens in the world and
4 the settlements don't work and we have to use that collateral,
5 then there will be nothing to return. But the anticipation is
6 that if the world remains somewhat stable that the fifty
7 percent that was now transferred to Barclays will be
8 transferred back to Lehman. That is the expectation.

9 THE COURT: All right. I appreciate that
10 explanation.

11 One comment before you continue, Ms. Fife. I'm just
12 once again hearing the Geiger counter. And we are connected to
13 two extra courtrooms and I know that there are people
14 participating at various occasions by telephone through
15 CourtCall. And I'm hearing increased static on the line. So,
16 I'm just going to request everybody who is participating in
17 this hearing, whether by telephone or in person, who has an
18 electronic device to shut it off. And if you're on the phone,
19 since you're just listening, please mute your phone.

20 MS. FIFE: Thank you, Your Honor. I'll continue
21 going through some of the changes, if that's okay. There was a
22 provision in a deal originally which required the debtors to
23 transfer 700 million dollars in cash to Barclays. And that is
24 no longer the case. There's no cash that's being transferred
25 to Barclays.

1 In addition, there was a provision in the contract
2 where Barclays was going to purchase a company called Eagle
3 Energy Management and they are no longer going to purchase that
4 entity.

5 We clarified, because a number of creditors had some
6 concerns during the -- yesterday we had a meeting with the
7 creditors and they were asked some questions regarding
8 intercompany claims. We made it very clear in this
9 clarification that we are not transferring any intercompany
10 payables or receivables. Those remain with the particular
11 entities.

12 There was a reference in the agreement to a mortgage
13 that was on the 745 Seventh Avenue property. And as it turned
14 out, Your Honor, there is no mortgage on that property. So we
15 deleted that reference. There was a 500 million dollar
16 promissory note made by 745 in favor of an affiliate which will
17 be repaid and extinguished.

18 Those are the major changes to the transaction.
19 There were some other clarifications that we made but I don't
20 consider them material, Your Honor.

21 THE COURT: I still consider 500 million dollars
22 material, though.

23 MS. FIFE: Yes.

24 THE COURT: So, the money that's due an affiliate,
25 what affiliate is that? And as a result of the payment, how

1 does that impact the overall realization to the estate?

2 MS. FIFE: Umm --

3 THE COURT: Maybe it doesn't.

4 MS. FIFE: Yeah. I don't think it does, Your Honor.

5 We still anticipate that the full purchase price will be paid
6 to 745 and then transferred up to the holding company and the
7 note will be extinguished -- I'm sorry? Yeah. It already has
8 been extinguished.

9 THE COURT: Okay.

10 MS. FIFE: Do you have any further questions, Your
11 Honor?

12 THE COURT: I may have some as we proceed. It's hard
13 for me to tell, based upon this helpful oral presentation, how
14 the deal has moved in terms of material changes and whether or
15 not those changes affect, in any way, the objectors and whether
16 or not these are changes that make the objectors happy or sad.

17 MS. FIFE: Right.

18 THE COURT: It's unclear to me at the moment because
19 I haven't had a chance to reflect on it and I don't know what
20 documents have been prepared that will clarify this. But I'm
21 confident that as the evening progresses, I'll learn more.

22 MS. FIFE: Yes. We're hopeful that we'll have the
23 documents so that everyone can look at them. And just one
24 other thing I wanted to point out to Your Honor, we are keeping
25 approximately twenty million dollars -- twenty billion dollars

1 of assets in LBI that are not being transferred. So those
2 assets will have value and inure to the benefit to the SIPC
3 estate. Okay?

4 THE COURT: Thank you for that.

5 MS. FIFE: I'm now going to turn it over to Mr.
6 Miller.

7 MR. MILLER: Your Honor, I don't think it's necessary
8 to repeat that we did make another change in connection with
9 the time to object to cure amounts which was in --

10 THE COURT: I remember you said that before. One
11 thing I do want to take care of as a piece of unfinished
12 business from before the break. And that's the creditors'
13 committee's position with regard to the Citibank comfort order.

14 MR. DESPINS: Your Honor, there was a reason why
15 there was some -- we couldn't address it is 'cause our
16 conflicts counsel was going to look at those issues. Susheel
17 Kirpalani is here and he will address that, Your Honor.

18 MR. KIRPALANI: Good evening, Your Honor. Susheel
19 Kirpalani of Quinn Emanuel for the creditors' committee. Your
20 Honor, it's been represented to us that this is the same type
21 of relief that was requested with respect to the Chase motion.

22 THE COURT: It was represented to me as well.

23 MR. KIRPALANI: Yes, Your Honor. It appears that the
24 language is the same. The Chase motion -- or the Chase order
25 dealt with securities and cash. And so the language is a

1 little bit different. It talks about how the pre-petition
2 amounts are -- or the post-petition amounts are secured by as
3 opposed to have an allowable setoff right. And while I agree
4 that's not a distinction with a difference, the one thing
5 that's not clear to me from the Chase motion is the mutuality
6 issue. I apologize, but the timing is such that I've been
7 getting e-mails from my office. If I could just ask the
8 debtors, was there no mutuality issue in the Chase motion and
9 the same issue here? Meaning that in the Chase motion, was it
10 clear that the accounts and the obligations were both owed by
11 the same entity and the same thing is true here? Or are we
12 relying on a contract exception to mutuality?

13 MR. KRASNOW: Your Honor, both as to the JPMorgan
14 Chase agreements, so too as with respect to the Citibank
15 agreements, Holdings is the guarantor. And it is Holdings'
16 collateral which was at issue in both instances. So, other
17 than JPMorgan Chase dealing with securities and cash, although
18 as to the Holdings company, it was just cash, as I recall, with
19 respect to Citibank, it is just cash. So in all material
20 respects, the orders are identical, Your Honor.

21 THE COURT: I'm satisfied. Are you?

22 MR. KIRPALANI: Yes, Your Honor.

23 THE COURT: Good.

24 MR. KRASNOW: Thank you.

25 MR. KIRPALANI: Thank you, Your Honor.

1 THE COURT: The order will be entered.

2 MR. KRASNOW: Your Honor, may I be excused? I think
3 that was my only --

4 THE COURT: I'm sorry?

5 MR. KRASNOW: I think that was my only business here.
6 Should I be excused?

7 THE COURT: You mean, you don't want to stay? Sure,
8 you may be excused.

9 MR. KRASNOW: Thank you, Your Honor.

10 MR. MILLER: Good evening, Your Honor.

11 THE COURT: Good evening.

12 MR. MILLER: You know, Your Honor, as I was sitting
13 here listening to what was going on, it occurred to me that the
14 way we do business today is so different from the way we used
15 to do business.

16 THE COURT: It could be you.

17 MR. MILLER: It could be me. I had trouble getting
18 through security today.

19 THE COURT: Do you have anything on in your pocket?

20 UNIDENTIFIED SPEAKER: Are you radioactive?

21 MR. MILLER: I think my flak jacket, Your Honor. I
22 think that's it. These decisions, Your Honor, are being made
23 almost in split second timing. One has to think about the
24 decisions that were made in connection with the bailout at Bear
25 Stearns. How much time was devoted to that? The decision to

1 open access to the Primary Dealer Credit Facility at the
2 Federal Bank to support the banking industry, to commit the
3 federal government to what might be hundreds of billions of
4 dollars to save Fannie Mae and Freddie Mac and to have the
5 government advance eighty-five billion dollars to save AIG.
6 And now, Your Honor, within the space of maybe a few days for
7 the government to adopt a variation of the Resolution Trust
8 Company or the Reconstruction Finance Corporation to save the
9 economy and the welfare of the people who are dependent upon a
10 stable economy.

11 The tragedy of Lehman, Your Honor, is part and parcel
12 of the design to preserve and stabilize financial markets.
13 Access to federal funding to maintain the business of Lehman
14 Brothers incorporated the need to put Lehman Brothers Holdings
15 Inc. into Chapter 11 as part of a plan to move that sensitive
16 business of LBI to a qualified buyer as soon as possible. A
17 buyer who meets the qualifications necessary to operate such a
18 business -- which is a universe, I might add, Your Honor, that
19 is only limited to a few possible candidates. In making those
20 decisions that the government or parties involved wait for
21 ordered reports, appraisals, physical inventories, a review of
22 each and every document relating to the transaction, I think,
23 Your Honor, the answer is no. They had to do what was
24 necessary to protect the greater good and not to lose the
25 forest for the trees.

1 Clearly, our economy was and is dependent upon those
2 decisions and sole decisions which would come in the future few
3 weeks. The decisions affected and would affect millions of
4 people. In the case of Lehman, it affects directly the 25,000
5 employees whose futures became extremely clouded because of the
6 events of last weekend.

7 The future of many of those people hangs in the
8 balance in connection with the transaction before the Court.
9 If it's not approved, no one can predict with any certainty the
10 consequences other than to note that there will be additional
11 turmoil and thousands of transactions will be suspended. The
12 volatility and distress of the liquidation of collateral
13 positions will be unmatched in history. The unemployment rolls
14 for the metropolitan area will increase dramatically, not to
15 mention the financial losses incurred by ordinary people who
16 would be prejudiced by their inability to reach their accounts.

17 Expedition, Your Honor, is mandatory. Events move
18 with the velocity that almost defies comprehension. In this
19 kind of world, form cannot be exalted over substance. The
20 substance of this transaction is to continue a business for the
21 benefit of the general economy, the employees whose lives are
22 at stake and to fit a small piece into the jigsaw puzzle of
23 maintaining a stable economy. We cannot take the risk of
24 rejecting this transaction because of ambiguities, the lack of
25 a piece of paper to support every element of the assets to be

1 transferred, the lack of definition as to particular items. We
2 have to think and we have to act in the same manner that the
3 decisions were made by the government and others over the past
4 week to expend billions and billions of dollars to shore up the
5 economy. Lehman is here because it was necessary to assure
6 LBI's access to the support of the Federal Reserve Bank and the
7 SEC support and to allow LBI access to the window to support
8 the transactions that were pending before there was a run on
9 the bank. To dissipate that effort, by rejecting a transaction
10 that is intended to save jobs, protect customers and enable a
11 relatively smooth transition of the LBI business and bring
12 value to all involved, would be a miscarriage of justice and
13 detrimental to the national interest.

14 Since the hearing last Wednesday, and in the space of
15 roughly twenty-four hours, Your Honor, there have been a number
16 of significant events. Yesterday, the Chicago Mercantile
17 Exchange unilaterally decided to close out all of Lehman's
18 positions on that exchange. That closeout resulted in a loss
19 to Lehman of approximately 1.6 billion dollars. Earlier this
20 afternoon, Your Honor, the Securities Investor Protection
21 Corporation initiated a proceeding under the Securities
22 Investor Protection Act in the United States District Court for
23 the Southern District of New York.

24 THE COURT: Excuse me, Mr. Miller. You're being
25 interrupted, as is this entire proceeding, by someone who's on

1 the telephone who's whispering into the courtroom. As I said
2 at the outset, everybody who is listening on the phone, mute
3 your phone. Everybody who has an electronic device, find it
4 and shut it off or throw it away.

5 MR. MILLER: Your Honor, as I was saying, this
6 afternoon the Securities Investor Protection Corporation
7 initiated a proceeding under the Securities Investor Protection
8 Act in the United States District Court for the Southern
9 District of New York. Mr. James Giddens, an attorney and
10 experienced SIPC trustee, has been appointed as trustee in the
11 SIPC proceeding. LBI consented to the commencement of the SIPC
12 proceeding. And during the past few days, Mr. Giddens was
13 provided with information concerning the state of affairs at
14 LBI and the need for expedition and support of the sale
15 transaction. Mr. Giddens is a recognized SIPC trustee and a
16 man of great talent, Your Honor. He recognized the
17 extraordinary nature of what is occurring and, unusual for a
18 SIPC proceeding, SIPC and the trustee have agreed that trading
19 in customer accounts --

20 THE COURT: Sorry. Technical difficulties.

21 MR. MILLER: In that SIPC proceeding, Your Honor, the
22 trustee and SIPC have agreed that trading in customer accounts
23 may continue in the ordinary course of business rather than be
24 suspended as is usual in a SIPC proceeding. SIPC and the
25 trustee have expended extraordinary efforts in an extraordinary

1 case to protect the public customers and ensure stability and
2 preservation of customer interests. Their actions are to be
3 commended, Your Honor. And I believe, Your Honor, that the
4 SIPC proceeding has been referred, I hope, to Your Honor.

5 THE COURT: I've seen Judge Lynch's order. I have a
6 certified copy of it and the order includes a decretal
7 paragraph removing those proceedings to this court. I'm
8 satisfied that the seal is in fact genuine and I'm prepared to
9 proceed with full authority.

10 MR. MILLER: And, Your Honor, Mr. Giddens is here
11 with Mr. Kevin (sic) Caputo from SIPC and the president of
12 SIPC, Your Honor, Mr. Stephen Harbeck who's sitting in the jury
13 box.

14 THE COURT: Gentlemen, welcome.

15 MR. GIDDENS: Thank you, Your Honor.

16 MR. MILLER: Barclays, Your Honor, has extended the
17 sale to enable this extraordinary transaction and hopefully to
18 be consummated. Yesterday, as Your Honor has heard, Barclays
19 basically stepped into the shoes of the Federal Reserve in
20 connection with the Primary Dealer Credit Facility as to the
21 45.5 billion dollars Lehman borrowed last Monday and received
22 the collateral that Lehman had posted in connection therewith.

23 Because of the circumstances this week, Your Honor,
24 the operations of LBI have resulted in approximately 300,000
25 sales, which is very significant. In addition, Your Honor,

1 because of the administration proceeding in the United Kingdom
2 for LBIE and the freezing of all of the assets of LBI that were
3 in the possession of LBIE, which I believe, Your Honor, stands
4 for Lehman Brothers England, relating to repo financings, the
5 result is that we were unable -- or LBI is unable to deliver to
6 Barclays the assets that were originally intended under the
7 APA. That's one of the reasons, Your Honor, for the amendments
8 that we heard about earlier today.

9 There are many moving parts in what we are trying to
10 do, many of which are beyond the control of Lehman or Barclays
11 as market forces operate to affect the value of the transaction
12 and the assets. Enormous problems did arise in connection with
13 clearing transactions that have caused a number of
14 modifications to the transaction. The necessity of assuring
15 DTC and other clearing institutions who will not expose
16 themselves to additional liability of some kind has been
17 enormously time consuming.

18 It's because of that, Your Honor, that we have heard
19 about these changes. But if Your Honor will look at the basic
20 agreement, the amount of cash consideration will be relatively
21 the same except for the issues with respect to the value of the
22 real estate. The 250 million dollars being paid for the
23 goodwill of LBI will go to LBI. The real estate, 745 Seventh
24 Avenue, and the two data centers in New Jersey, that's with a
25 variation, Your Honor, and there's some negotiation to be done

1 with Barclays in connection with that. And so there might be a
2 decrease of that one billion four fifty that we talked about on
3 Wednesday to something in the area of a billion three to a
4 billion three fifty, in that area.

5 THE COURT: Let me break in with respect to that
6 issue --

7 MR. MILLER: Sure.

8 THE COURT: -- because it's something that concerns
9 me. I read most of the objections --

10 MR. MILLER: Yes, sir.

11 THE COURT: -- and there were a lot of them. And I
12 may have missed some that came in late. But none of them
13 picked up the issue that concerned me. As I view the
14 transaction, and I need your help in telling me if I'm seeing
15 it incorrectly, most of the value is attributed to the real
16 estate. But there has been no traditional marketing effort for
17 the real estate. Instead, the real estate represents a tie-in
18 to the sale of the broker dealer assets and the preservation of
19 markets and employment. One of the things that I think you may
20 need to get over for purposes of today's evidentiary hearing,
21 in terms of the showing you need to make, is that the
22 transaction as it relates to the real estate in particular is
23 fair value.

24 I know nothing about this appraisal. I don't know
25 who commissioned it. I don't know who the appraiser is. I

1 don't know if he or she is in court. But I am, frankly,
2 concerned that we're all hearing -- and maybe others heard it
3 earlier but I'm hearing it only now -- that there is this
4 negative variance in the assumed value of the real estate. And
5 I find that troublesome.

6 MR. MILLER: Yes, sir. We will try to deal with
7 that, Your Honor. Now, Your Honor, in connection with going
8 forward in the transaction, I don't know what order Your Honor
9 wants to go in, whether you want to hear oral statements of
10 objections or should we move right to the evidentiary hearing?

11 THE COURT: Well, one of the things I'd like to do,
12 and it's really to verify something, I don't recall seeing an
13 objection from the official creditors' committee. And I don't
14 know, as a result of that, whether the committee supports the
15 transaction, has issues with respect to the transaction or has
16 given you notice of whatever objections they might have. So it
17 seems to me that because of the expedited nature of today's
18 proceeding, we agreed Wednesday that written objections were
19 not necessary and, particularly, not necessary in the case of
20 the committee which had just been formed. I'd like to know
21 what the status is as it relates to that important
22 constituency.

23 MR. MILLER: Mr. Despins informed me, Your Honor,
24 before the hearing -- I'm losing my voice -- that the committee
25 will not object to the transaction but does not support it. So

1 they're not affirmatively -- I think not affirmatively going to
2 stand up and say --

3 MR. DESPINS: Why don't I address that, Your Honor?

4 MR. MILLER: Sure.

5 THE COURT: I think that would be helpful.

6 MR. MILLER: Don't change your position.

7 MR. DESPINS: Good afternoon, Your Honor. Luc
8 Despins with Milbank Tweed, proposed counsel for the committee.
9 I'm here with my partners, Paul Aronson and Dennis Dunne. The
10 headline is we are not objecting, Your Honor, but although
11 we'll have some minor comments to the form of order, which we
12 don't need to detain the court order at this point. And the
13 reason we're not objecting is really based on the lack of a
14 viable alternative. And, Your Honor, we're still a little bit
15 puzzled by the statement by Mr. Miller that we're not
16 affirmatively supporting. And that's correct. We're not
17 affirmatively supporting the transaction, Your Honor, because
18 there has been insufficient time for us to really do all the
19 due diligence that we would feel should be done to take that
20 next step of saying yes, this is the best deal and we're
21 supportive actively. We've met with the debtor. They've been
22 very cooperative. I don't want to imply that they have not
23 been but we have not had time to test the assumptions and do
24 all the due diligence we would normally do. So that is, Your
25 Honor, the distinction.

1 The second message, Your Honor, which is not directed
2 at Your Honor but really at the debtor and, generally, at also
3 regulators, is that the committee, although we're not objecting
4 to this transaction, we understand we're dealing with
5 extraordinary circumstances, as Your Honor has described. The
6 committee fully expects that after this, we're going to go back
7 to what I would call --

8 THE COURT: A more conventional model?

9 MR. DESPINS: Yes. Business as usual for Chapter 11,
10 if you will, Your Honor. The committee feels very strongly and
11 wanted me to say that they recognize the extraordinary nature
12 of what's going on here but they feel their duties are to pre-
13 petition creditors, not to the market participants, not to the
14 economy at large or other participants in those markets. And I
15 think that that's very important and it's very important to the
16 committee that I convey that message, again, not to Your Honor,
17 but really to the debtor and other parties in this case. So
18 that is where we stand, Your Honor.

19 THE COURT: I appreciate that. And it lifts the fog
20 over at least that aspect of the case. And I'm grateful for
21 the comment. Has there been any --

22 MR. MILLER: Your Honor, we --

23 THE COURT: Has there been any resolution by
24 agreement of any of the other objections? Or are they all live
25 at this point --

1 MR. MILLER: As far as --

2 THE COURT: -- except for the cure amounts perhaps?

3 MR. MILLER: As far as I know, Your Honor, I have to
4 say, Your Honor, there wasn't really time. They were cascading
5 through the electronic filing at such a rate, it was almost
6 impossible to keep up with them.

7 THE COURT: I know.

8 MR. MILLER: And so, with people dedicated to doing
9 the clarification of the APA -- of the asset purchase
10 agreement, there really wasn't an adequate amount of time. As
11 Mr. Despins says, Your Honor, this is such an exceptional
12 circumstance, I would feel relieved to get back to the ordinary
13 Chapter 11 process. It would be good for everybody's health.
14 But this is just an unusual situation. And while I understand
15 the committee's views and the parochial views as to general
16 unsecured creditors, we are facing a bigger picture and a very
17 difficult severe picture for everybody involved. And in
18 addition to the people in this courtroom, Your Honor, the
19 telephone is going -- just I can't tell you the rapidity of
20 calls from people, where's -- how can I get my securities?
21 This is my pension fund. And so on. This is a tragedy, Your
22 Honor. And maybe we missed the RTC by a week. That's the real
23 tragedy, Your Honor.

24 THE COURT: That occurred to me as well.

25 MR. MILLER: So I defer to Your Honor as to the

1 procedure for going forward. Should we have -- I would waive
2 opening statements at this point, Your Honor, since I've
3 already made mine.

4 THE COURT: Well, I propose the following. And I
5 think you've made your opening statement. I would propose the
6 following. I would like to hear -- I'm not sure what the right
7 time for that is -- from counsel for the SIPC trustee or the
8 SIPC trustee, beyond the fact that we've commenced a case, and
9 understand a little bit more about how that parallel proceeding
10 that is happening as we speak, in conjunction with the sale
11 process, truly does tie together with what we're now doing.
12 And I think that it would be useful for me to have an
13 evidentiary record that supports the sale motion. Once that
14 record is made, either through proffer or live testimony, based
15 upon the willingness of objectors to do it through proffer --
16 and if they object, that's fine. We can have witnesses. I
17 think it would be useful then to move on to the merits of the
18 objections and deal with the legal issues that confront us.

19 MR. MILLER: Yes, Your Honor. Mr. Caputo from SIPC
20 is here with us today.

21 THE COURT: Fine. Before he gets up, let me just
22 confirm that what I have -- often what I say is acceptable to
23 people when they hear it. But -- at least when I'm sitting
24 here. But is what I have outlined consistent with your views?

25 MR. MILLER: Whatever you say, Your Honor, is

1 acceptable to me.

2 THE COURT: Fine. I figured you'd say that. Let's
3 hear from the SIPC trustee.

4 MR. CAPUTO: Your Honor, my name is Kenneth Caputo.
5 I am counsel for the Securities Investor Protection Corporation
6 and I will be brief in my remarks and let counsel for the
7 trustee step in.

8 We did commence a case earlier today before Judge
9 Lynch intended to protect public customers of LBI. That has
10 commenced the SIPA liquidation which brings into there all of a
11 different proceeding but for the most part, it is essentially a
12 bankruptcy proceeding, Chapters 1, 3, 5 and subchapters 1 and 2
13 of Chapter 7 all apply in a SIPA case specifically. The unique
14 nature of what we have done in this case -- there are a few,
15 but first I have to mention the collaborative nature of the
16 proceeding that we had with all of the different regulatory
17 agencies. We had tremendous cooperation from the SEC, from the
18 Federal Reserve Bank of New York, from the CFTC, from private
19 parties, if you will, JPMorgan Chase, DTC.

20 I'm apologizing if I leave anybody out. But we came
21 together with a collaborative approach to deal with these
22 exigent circumstances, these truly unique circumstances. And
23 the other thing we've done is permitting the trustee to operate
24 the business of the debtor under 721 of the Code for a limited
25 period of time. That period of time to allow for transactions

1 to be affected expired at 6 p.m. this evening. And that was at
2 the urging of regulatory agencies and DTC to permit many more
3 contracts to be settled and then moved out of the entity so
4 that these individual customers can gain access to their
5 property in a quicker fashion.

6 The trustee also has the ability here to complete
7 settlement of transactions through next Tuesday, which is a 6
8 p.m. date on that regard, and to take other actions as
9 necessary to allow for the orderly transfer of customer
10 accounts. It is SIPC's goal here to get out of the way of the
11 normal and ordinary course of business and the fair and orderly
12 market transactions that can be affected so that not only the
13 institutional but the public customers of LBI have access to
14 their account in as quick a fashion as possible. It is my
15 understanding, based on representations from LBHI and their
16 participants, that we're talking about more than 600,000
17 accounts. Many of them are institutional. I believe the
18 number is somewhere in the range of 130,000 customer accounts
19 non-institutional. There was some allusion today to the PIM
20 aspect of the transaction which was affected and performs a new
21 part of the deal. Your Honor had a question about it. We
22 support it. It allows these customers, these high net worth
23 customers, essentially, to be moved and Barclays is assuming
24 those customers on the same platform at DTC, is my
25 understanding, that existed. So this is also going to permit

1 the effective administration of that estate of the trustee and
2 have less to do, essentially, Monday morning. And we stand
3 back from the proceeding at first but we have committed all of
4 the energy and all of the resources of SIPC to enable the SIPC
5 trustee to get his work done, to enable Barclays to step in,
6 take over the accounts that they are willing to take over and
7 then to deal with the other transactions in the ordinary course
8 of business as necessary.

9 THE COURT: Let me ask you a question about the
10 timing imperative as it relates to the undertakings of your
11 client. You mentioned a 6 p.m. cutoff date, I think, on
12 Tuesday.

13 MR. CAPUTO: Yeah.

14 THE COURT: In order for this transaction to be
15 optimally closed from the perspective of SIPC, when should it
16 close? Does it need to close this weekend before the markets
17 open on Monday?

18 MR. CAPUTO: The sale transaction?

19 THE COURT: Yes.

20 MR. CAPUTO: As soon as possible it needs to close.
21 The sooner the better. That's going to provide certainty to
22 parties and counterparties so that they can take the actions
23 that they deem necessary to protect their clients but it also
24 provides certainty to the hundreds of thousands of customers.
25 And that provides comfort to the markets and I think comfort on

1 a national scale as Mr. Miller alluded.

2 THE COURT: So without putting any more words in your
3 mouth, would it be your position on behalf of your client that,
4 assuming the sale transaction that has been proposed to me
5 today is approved, that the approval should happen before the
6 close of today's hearing? In other words, we should stay here
7 as late as we need to in order to get this done?

8 MR. CAPUTO: Yes, Your Honor. That would be our
9 recommendation.

10 THE COURT: Fine.

11 MR. CAPUTO: And if I may, Your Honor, I'd defer to
12 Mr. James Kobak, counsel for Hughes Hubbard who is counsel to
13 the trustee, to fill you in on some of the particulars
14 involving the actions that the trustee will take.

15 THE COURT: All right. Thank you.

16 MR. KOBAK: Good afternoon, Your Honor. Actually,
17 Mr. Caputo has done a lot of my job for me. So I would just
18 like to echo everything he said, especially the extraordinary
19 cooperation of everybody involved. Mr. Giddens is here and
20 he's prepared, and I think, in fact, he would probably like to
21 address you and some of the other counsel if you think that's
22 appropriate. I do have a couple of housekeeping items or maybe
23 a little more than housekeeping. This case has now been
24 officially assigned to you. It's on the docket and so forth.
25 We have an administrative order which would do things like

1 change the caption, approve the form of notice and so forth.
2 So we'll be filing that either over the weekend or sometime
3 early next week and probably put it on before Your Honor,
4 subject to Your Honor's calendar, later in the week.

5 We also have -- I have with me today an order because
6 the trustee has made an investigation and is prepared to
7 approve the transaction, thinks that the transaction is in the
8 best interest of customers and creditors of the SIPC estate
9 including some of the -- or all the changes that have been
10 discussed today. It's a condition of the deal that an order be
11 entered in the SIPC case that essentially adopts the order in
12 the Chapter 11. And we have such an order. And, in fact, we
13 made copies -- we haven't had time to serve it because we've
14 only been appointed, I think, maybe for a matter of two hours.
15 But we did make it -- maybe three hours by now, Your Honor.
16 But we did make it available to as many people as possible here
17 today.

18 And I think with that, if you would entertain hearing
19 briefly from Mr. Giddens --

20 THE COURT: I'd be delighted to hear from him.

21 MR. KOBAK: Good. Thank you, Your Honor.

22 THE COURT: In fact, I invited this presentation so
23 I'm pleased to have him come to the podium.

24 MR. GIDDENS: Thank you, Your Honor. SIPC and others
25 have been working equally so for a week and I should also say

1 it's been extraordinary -- there's been extraordinary
2 cooperation, 3 a.m. telephone calls, reviewing financial
3 statements with others. The staff of Lehman has been always
4 available. The law firm of Weil Gotshal has been
5 extraordinarily cooperative. And I think again, the response
6 of this extraordinary transaction by the team under Harvey
7 Miller is truly something we're all benefiting from.

8 The SIPC -- looking at this proceeding, I think
9 setting some things in context, when I looked at the balance
10 sheet of the broker dealer a few months ago, the assets were, I
11 think, approximately 497 billion dollars -- or the assets,
12 excuse me, were about 500 billion dollars and the liabilities
13 were 497 billion, which is not unusual for a brokerage firm.
14 Nevertheless, with a pro forma balance sheet which I reviewed
15 with members of the SEC, accountants, people from Lehman,
16 lawyers and others, those assets had decreased because of
17 changes in market from 500 billion to less than a hundred
18 billion. And part of the exercise, of course, with the broker-
19 dealer after -- the first role of a SIPC proceeding is to
20 maintain orderly markets and to try to preserve normalcy for
21 customer accounts. That, I think, has been done here in large
22 measure. There are 629,000 accounts. Through extraordinary
23 efforts a substantial number of those will be transferred.
24 There will remain, by estimate, several thousand, which may
25 take considerable amount of time to resolve disputes,

1 controversies, monies owed to Lehman and the like, which will
2 take some time to deal with. All of those will be dealt with
3 in the context of the SIPC liquidation.

4 Congress created and provided that any -- when a
5 broker-dealer such as SIPC or Merrill Lynch was in financial
6 difficulty it had to be liquidated, it could not be
7 reorganized. And it had to be done so under the specific
8 provisions of the Securities Investor Protection Act, which, in
9 effect, can create certain priorities and preferences for
10 customers. And so that's the first job of a trustee. I think
11 that we have focused on that and spent considerable resources
12 in trying to accomplish that.

13 Nevertheless, as the Federal Reserve, the SEC and
14 other regulators involved in this, there will be considerable
15 assets. Of course, in this proceeding, 500 million, three
16 billion are really deemed to be de minimis numbers. But there
17 are complicated transactions which are in securities and
18 derivatives, private equity investments, all of which will have
19 to be analyzed and resolved in the course of our marshalling
20 the assets of the broker-dealer. The broker-dealer is out of
21 business. They could not conduct additional business after 6
22 p.m. Most of the personnel and typical brokerage assets have
23 been transferred to Barclays or will go to other places.
24 Nevertheless, we will be left with substantial -- there are
25 subsidiaries which have to be, again, mostly dealing with

1 securities and derivatives and the like, whose assets and
2 issues will have to be sorted.

3 It's, I think, the intent of the statute that those
4 kinds of things are dealt with in this proceeding, and we
5 would, of course, intend to work closely with DTC, with
6 regulators, of the SEC in particular, the Federal Reserve,
7 foreign regulators dealing with resolutions to these kinds of
8 issues.

9 So we have many challenges and much work ahead of us.
10 There's no indication we'll have a small amount of money, cash.
11 The liabilities, as best I can determine them, are in the
12 billions. And there are potential assets which are also valued
13 highly on the balance sheet. As to what those assets will be,
14 many of which appear to be -- have decreased, because of market
15 conditions, substantially in value just in a matter of days, I
16 really cannot tell.

17 As I say, we intend to work cooperatively with
18 everyone, try to work quickly and efficiently. Again, we have
19 all the kinds of issues you would have if you -- the residue of
20 any major financial institution. And, again, it's challenging
21 because Lehman was certainly one of the most complex, versatile
22 and finest of the financial institutions globally. And I must
23 say that all early indications are -- the good thing is, unlike
24 other liquidations we've been involved in, there's no
25 indication of sloppy record keeping, missing customer funds and

1 the like. Now, that is not to say, as Mr. Miller indicated,
2 there have already been 300,000 failed transactions just in a
3 matter of days. So it's a complex undertaking that, as I say,
4 we have been working around the clock and will continue to do
5 so to try to resolve those issues, taking care of customers,
6 which is a priority, promoting the orderly transfer of
7 accounts, but also trying to fairly resolve many, many open
8 issues relating to complex securities transactions.

9 So, thank you.

10 THE COURT: Thank you. Mr. Miller?

11 MR. MILLER: Your Honor, I think there may be some
12 other regulators that want to --

13 THE COURT: I didn't realize there were others who
14 wanted to speak in connection with the SIPC proceeding.

15 MR. HIRSHON: Yes, Your Honor. Sheldon Hirshon,
16 Proskauer Rose, representing Depository Trust & Clearing
17 Corporation.

18 I too rise to urge the Court to act on this matter as
19 quickly as possible. And I wanted to explain a little bit more
20 about the plumbing, if you will.

21 The Depository Trust & Clearing Corporation is
22 actually the holding company for three separate clearing
23 corporations, DTC, NSCC, and FICC. And the reason that they're
24 somewhat different is because they clear different kinds of
25 securities.

1 You heard that there are roughly 600,000 institution
2 clients and 170,000 retail clients of Lehman. Lehman has an
3 account at DTC and I'll use that globally to refer to each of
4 these clearing corporations. And many, if not all, of the
5 transactions that those customers process come through the DTC.
6 So all of those people are trading through a Lehman account at
7 DTC. DTC, itself, is a securities agency; it's registered
8 under 17A of the 1934 Act. It is supervised by both, the
9 Federal Reserve and the SEC.

10 We have participated along with the other regulatory
11 agencies to facilitate this transaction. The magnitude of the
12 transaction as you've now heard, the number of trades that come
13 through, the 300,000 failed trades, meaning that there hasn't
14 been a delivery either on one side that is a sale or buy. All
15 of those have to be worked out and we need to really focus on
16 that and hopefully understand what that is and maybe even clear
17 most, if not all of them, by Monday when the market reopens.
18 And we hope to have transferred the accounts from Lehman to
19 Barclays so that it would be seamless. So that when the
20 customer calls up on Monday to place an order it will be
21 prosecuted and then cleared.

22 So that's why we've risen to urge the Court to
23 consider this. It is an extraordinary moment. And in order to
24 keep the market stabilized and have an opening on Monday where
25 Barclays can trade as if it were Lehman, we need to have this

1 transaction approved today and as early in the evening as
2 possible so then we can go back to our offices and do the work
3 we need to do, sign the various documents to transfer, and get
4 all the regulatory approvals that are required.

5 Thank you, Your Honor.

6 THE COURT: Thank you.

7 MR. MILLER: Your Honor, taking Mr. Hirshon's cue
8 from what he just said, I would propose, Your Honor, as direct
9 testimony, that we would offer a proffer at this time.

10 THE COURT: That's fine. But Mr. Bienenstock is
11 raising his hand, however, and may have an issue.

12 MR. BIENENSTOCK: Your Honor, as I think Your Honor
13 anticipated, the issues here are mostly legal rights with the
14 relief they're going to be requesting. I've asked three times
15 for the proposed order, which at the recess they said has
16 changed. It's in the courtroom, I'm told.

17 Before I agree to a proffer, as opposed to the
18 witnesses, I'd like to see -- and for due process, I'd like to
19 see the relief being requested in writing, that's what this
20 hearing is all about at this point, I think.

21 THE COURT: All right. Well, let's deal with that.
22 And maybe in light of the fact that you're actively
23 participating at this moment, and given the awkwardness of the
24 distance from the bench and microphones, we can have Mr.
25 Bienenstock walk through the gauntlet and come to the front of

1 the courtroom.

2 Apparently, there will be others joining him and --

3 MR. GOLDEN: Your Honor, I just want to make sure --
4 we don't have an objection --

5 THE COURT: You have to identify yourself by name,
6 even though I know you.

7 MR. GOLDEN: Daniel Golden Akin Gump Strauss Hauer &
8 Feld, counsel for an ad hoc bondholders group.

9 We have no objection to proceeding by proffer as long
10 as the proffered witness will be available for cross-
11 examination.

12 THE COURT: That's fine.

13 MR. MILLER: I was only offering direct testimony,
14 Your Honor, as a proffer.

15 THE COURT: Mr. Bienenstock, do you wish to
16 comment -- I view what you said as an objection to proceeding
17 by means of proffer until such time as there is a writing that
18 clarifies the relief being sought in the pending motion at this
19 moment. Do I understand your position correctly?

20 MR. BIENENSTOCK: Yes, Your Honor, with one step
21 further. I really think, based on all of the circumstances,
22 it's enough that everyone showed up at 4 p.m. without knowing
23 what deal was being proposed. Not pointing fingers, again,
24 Your Honor, but these are just how the facts unfolded.

25 We not only knew -- didn't know the deal being

1 proposed, we didn't know and do not know at this instant the
2 relief being requested, and yet this hearing is going forward.
3 It's really -- I don't think I've ever had occasion in my
4 career to make such a due process argument, but the facts
5 compel it. I'd like to see the relief being requested before
6 this proceeds. Whether by proffer or by live witness. And I
7 think everybody, including the Court, should know what's the
8 relief being requested.

9 THE COURT: Well, I'll let Mr. Miller respond to
10 that, but I'm going to give you a reaction to what you just
11 said, too.

12 I've attempted to distill and digest from my own
13 understanding the various objections that have been filed,
14 including the objection that you filed. And many of the
15 objections, but not all of them, raise questions as to
16 vagueness in the asset purchase agreement, ambiguous provisions
17 in the asset purchase agreement, concerns with respect to the
18 sale of nondebtor assets, and confusion associated with the
19 speed with which the transaction is proceeding that makes it
20 more difficult for parties-in-interest to comprehend precisely
21 how they're affected by the transaction. In fact, you said
22 much the same thing differently on Wednesday on behalf of your
23 clients.

24 But I also understand that since Wednesday, in a
25 process of a cooperative information sharing, as opposed to

1 coercive discovery, there have been many opportunities offered
2 to parties such as your client and you. I have no idea what
3 happened and I don't need to know that right now. But my
4 working premise is that in a manner somewhat comparable to the
5 level of cooperation described by the SIPC trustee that has
6 existed between the regulators and the SIPC trustee and Mr.
7 Miller's firm in making this dramatically emergent transaction
8 happen, that through discovery -- informal discovery, parties-
9 in-interest, including the creditors' committee, has gotten to
10 the point of at least acquiescing because the transaction is so
11 significant to the markets, to the employees, to the U.S.
12 economy, to the world economy.

13 I think I know what's going on here, and I'm not
14 saying that you necessarily know how your client's rights are
15 affected. But I have a pretty good idea, even with the
16 modifications that I've only heard about as recently as when I
17 took the bench an hour or two ago, I can't remember what time
18 it was. I understand this deal, not in every aspect but
19 certainly in broad outline. I have notice. This is a
20 hearing. I believe that for due process purposes we are all
21 here with, perhaps cobbled together notice, but it's notice.
22 The form of order undoubtedly is something that parties will be
23 arguing about. But I believe that it is not a necessary
24 precondition to proceeding with the hearing that parties know
25 more in terms of what's before me. Because unless you have

1 another argument to make, I'm satisfied that I know the relief
2 that's being sought.

3 In conjunction with the SIPC proceeding,
4 substantially all of the going concern value that exists within
5 these assets is to be preserved. Assets, principally the real
6 estate, will be sold for a value that I've already questioned.
7 The essential terms of the transaction, with modifications,
8 have been understood at least for the last few days.

9 What I think you're addressing, and I don't want to
10 speak for you, is that there are particulars of the transaction
11 as it affects your client that you're still uncertain about. I
12 believe that we should proceed with proof. Everybody's rights
13 are reserved. If there's a need for a witness to testify live
14 on cross-examination after a proffer, the witness is available
15 and will be exposed to cross-examination. If there's an
16 objection to proceeding by means of proffer, this is the time
17 to make that objection. So question one is do we or don't we
18 at least offer the direct by means of a proffer?

19 MR. BIENENSTOCK: If you're asking for my response
20 first, it's --

21 THE COURT: It might as well be because you're right
22 there.

23 MR. BIENENSTOCK: If the debtor will demonstrate its
24 cooperation and give us the proposed order so we can read it, I
25 would have no objection proceeding by proffer. Otherwise, I do

1 object.

2 MR. MILLER: Here's the order.

3 MR. BIENENSTOCK: Thank you.

4 THE COURT: Okay.

5 MR. BIENENSTOCK: I have no objection to proceeding
6 by proffer.

7 THE COURT: All right. That must be the most
8 difficult request for a form of order I have ever seen. Mr.
9 Sabin?

10 MR. SABIN: Good afternoon, Your Honor. Jeffrey
11 Sabin from Bingham McCutchen on behalf of Harbinger Capital
12 Special Situations and Harbinger Capital Partners Master Fund.

13 I rise not to object to the proposed proffer. And we
14 did file a limited objection. And based upon what we have
15 heard before you took the bench in the interim, and based upon
16 what you heard from Ms. Fife when we presumed this hearing, we
17 have two other clarifications that perhaps could be part of the
18 proffer that I think we heard. And assuming that these two
19 representations are indeed part of the proffer and the process
20 is otherwise as you described with respective parties-in-
21 interest participating in getting to a fully consensual order,
22 our objection would be resolved.

23 So let me first talk about those two additional
24 things that I understood are material, enough at least to my
25 client, to put it on the record at this point. First, that no

1 assets of any of the nondebtors, whether in this Chapter 11
2 cases or in the SIPC proceeding are being sold as part of this
3 transaction. And we would seek that representation, not only
4 from the debtors, but from the purchaser and from the SIPC
5 trustee.

6 THE COURT: I hate to break in on that. But if I
7 heard what Ms. Fife had to say, there are some nondebtor assets
8 that I believe are being sold. Lehman Canada, Lehman
9 Sudamerica and Lehman Uruguay S.A.

10 MR. SABIN: I believe, Your Honor, that would be an
11 asset of LBHI, the parent. And the asset being sold is stock
12 so that you would have jurisdiction. Just to clarify for the
13 record.

14 MR. DESPINS: Your Honor, I apologize, but I believe
15 their real estate is owned by -- is it all owned by the
16 debtors? The New Jersey real estate as well?

17 UNIDENTIFIED FEMALE SPEAKER: Yes.

18 MR. DESPINS: I apologize, Your Honor. It's a
19 limited liability company which the debtor owes ninety-nine
20 percent.

21 THE COURT: Mr. Sabin, before you proceed with your
22 remarks, just because I think for good order you should have
23 the full attention of the bench and the full attention of those
24 who are in the room, pause for a minute, because there's some
25 movement that I'm finding distracting. Mostly having to do

1 with the passing out of the form of order so that Mr.
2 Bienenstock's ability to review it is not an exclusive
3 privilege.

4 Why don't you proceed?

5 MR. SABIN: Thank you, Your Honor. So to be precise,
6 after the various comments I'll go back to what I believe to be
7 the understanding of an additional material term, if you will,
8 that will be set forth in a so-called six-page clarification
9 letter that will constitute an amendment to the as-filed
10 version of the APA. And that is a representation, or as part
11 of the proffer, which is supported also not only by the debtors
12 but by the purchaser and by the SIPC trustee, that no assets of
13 any nondebtors, whether in the Chapter 11 cases or in the SIPC
14 proceeding are being sold as part of this transaction.

15 And for clarity, I understand from the remarks of Ms.
16 Fife, that there are certain equity interests that constitute
17 property of the estate of one or more of these debtors that
18 will now be part of this transaction.

19 MS. FIFE: Your Honor, if I may?

20 THE COURT: Sure.

21 MS. FIFE: During the break that issue came up. And
22 I responded that there were no nondebtor assets being sold.
23 However, I was incorrect in one very small way. There is some
24 intellectual property that is held by nondebtors that is
25 primarily used and necessary for the LBI business, and that is

1 being sold pursuant to this transaction. Other than that, no
2 other nondebtor assets are being sold.

3 THE COURT: Is this intellectual property held in a
4 special purpose entity?

5 MS. FIFE: We're not exactly sure what entity it's
6 held in. I wouldn't say, though, it's a special purpose. It's
7 perhaps spread out through other subsidiaries.

8 THE COURT: Okay. It sounds like there's some
9 nondebtor property, but it's IPR.

10 MR. SABIN: I'm just going to reserve for that part
11 of our objection related to this issue. But it doesn't sound
12 like it's a material asset that is part of the transaction
13 itself.

14 Number two, in that same session where Your Honor was
15 not in participation, we understand that so-called master
16 netting agreements and securities contracts, other than those
17 already owned as of today by Barclays, will not be part of the
18 sale by LBI in this transaction.

19 THE COURT: In making that statement, are you seeking
20 a clarification that what you had just said is true?

21 MR. SABIN: I am, Your Honor.

22 THE COURT: Who's going to confirm that, if it's, in
23 fact, true?

24 Maybe that will have to be confirmed at some other
25 time.

1 For record purposes, it's unclear what just happened.

2 MR. SABIN: I think, let the record reflect that the
3 parties with knowledge will confer and hopefully we will
4 resolve it and get an answer on the record.

5 THE COURT: Fine.

6 MR. SABIN: The additional matters, Your Honor, that
7 we have a concern with, which of course, were not facts known
8 when we filed our objection, deal with the intent and maybe
9 it's already an act of the SIPC trustee. With respect to the
10 existing five corporate entities that are subsidiaries, as we
11 understand it, of LBI, which is now subject to the SIPC
12 proceeding. And whether or not any or all of those entities
13 will indeed become, or have become, as we sit here, debtors,
14 whether in Chapter 11 or Chapter 7, especially given our
15 understanding that the proceeds going to LBI are just 250
16 million dollars. And given our understanding that many of the
17 employees who may have otherwise supported the services of some
18 or all of those entities will no longer be supporting those
19 entities.

20 Other than that, Your Honor, no longer delay. And I
21 will turn the podium to Mr. Miller to go forward with the
22 proffer.

23 THE COURT: I don't think you received a
24 clarification on that last point. Is that something that can
25 be clarified now or should it be clarified later?

1 My suggestion is for good order that we, at some
2 point, have a break. You and others will have an opportunity
3 to meet and confer and gain some additional information. And
4 that we proceed by way of proffer unless there's someone else
5 who has something to say on that subject.

6 MR. SABIN: Thank you, Your Honor.

7 THE COURT: Thank you.

8 MR. MILLER: Harvey Miller, Your Honor, for the
9 debtors, again.

10 If Your Honor please, I would offer proffer, the
11 testimony of Herbert H. McDade. If Mr. McDade, Your Honor,
12 were called to the stand to testify, he would testify to the
13 following effect:

14 Mr. McDade received a Bachelor of Arts degree from
15 Duke University and a Masters of Business Administration from
16 the University of Michigan.

17 After joining Lehman Holdings in 1983, Mr. McDade was
18 named head of Corporate Bond Department in 1991. In 1998 he
19 was named global head of Debt Capital Markets. In 2002 Mr.
20 McDade was named to Lehman Holdings Operating Committee. He
21 has served as global head of the Fixed Income Division for the
22 period June 2002 through 2005. In June of 2005 Mr. McDade
23 assumed the responsibilities of the global head of Equities
24 Division. Mr. McDade has over twenty-five years of experience
25 in managing a company's financial operations.

1 Mr. McDade would testify that Lehman Holdings'
2 predecessor was founded in 1850. Since that time Lehman
3 Holdings grew into the fourth largest investment bank in the
4 world. He would testify that through Lehman Holdings'
5 subsidiaries, it is a global market maker in all major equity
6 and fixed income products. Lehman Holdings' subsidiaries are
7 members of all principal securities and commodities exchanges
8 in the United States, including FINRA and the NYSE. And
9 memberships on several principal international securities and
10 commodities exchanges, including London, Tokyo, Hong Kong,
11 Frankfurt, Paris, Milan, Singapore and Australia.

12 Lehman is a global leader -- was a global leader in
13 equity and fixed income sales, trading and research, investment
14 banking, private investment management, asset management and
15 private equity.

16 Mr. McDade would testify that the tightening of the
17 U.S. and international markets caused Lehman Brothers to
18 experience a severe liquidity crisis.

19 Now Lehman Holdings' broker-dealer subsidiary, Lehman
20 Brothers Inc., relies to a large extent upon funding from
21 Lehman Holdings, which is the public company and the issuer of
22 debt -- unsecured debt that provides funds for the entire
23 organization. And that such funding is no longer available to
24 provide to Lehman and LBI.

25 And as each hour has passed and uncertainty is

1 prolonged, investor's faith in the market has weakened the
2 value of Lehman's business and it has rapidly deteriorated.

3 The state of affairs at Lehman Brothers Holding Inc.
4 and LBI is critical and their fate just jeopardizes their
5 affiliates' ability to conduct business.

6 Absent approval of the Barclays' transaction, the
7 broker-dealer business would discontinue as a going concern and
8 adversely impact the credit markets on a global scale in ways
9 that are immeasurable.

10 He would testify that Lehman Brothers and its
11 advisors have literally spent every hour attempting to preserve
12 Lehman Holdings' estate and LBI's broker-dealer business.

13 Other than the liquidity crisis, Lehman has been
14 facing pressure and constraints from regulators and agencies.
15 The Federal Reserve, the SEC, the CFTC and other governmental
16 entities have been putting constant pressure on Lehman to
17 engage a prospective buyer and consummate a sale of the broker-
18 dealer business, no later than today, so that there is a
19 seamless transition to preserve the business.

20 Other than the pressures from regulators, Mr. McDade
21 would testify that the broker-dealer's customers are in a state
22 of panic. Vendors are threatening to stop providing services.
23 Lehman is experiencing severe internal pressures. He would
24 testify that it would be an understatement to state that the
25 morale of the employees is low. Employees have and will

1 continue to defect. And the images on television of employees
2 streaming out of the Seventh Avenue headquarters with boxes and
3 suitcases with their possessions is self-evident proof of what
4 is happening.

5 He would testify that the broker-dealer business
6 services over 600,000 customer accounts, and that it could take
7 several months to transfer all of the accounts in the ordinary
8 course of business. In its current state the broker-dealer
9 does not have sufficient capital to service its customer
10 accounts while transferring them to another broker-dealer in
11 the ordinary course of business. The market value of customer
12 accounts is in the hundreds of billions.

13 Mr. McDade would testify that the broker-dealer is
14 dependent upon financing from Lehman Holdings Inc., the holding
15 company during the period prior to the Chapter 11 case.
16 Without access to financing, the broker-dealer is incapable of
17 servicing its customer accounts. As a result, the broker-
18 dealer would have no choice but to close its customer accounts
19 and that would result in billions of dollars of losses and
20 damages.

21 If the broker-dealer is not able to settle trades, a
22 SIPC trustee will commence a proceeding and there has been a
23 proceeding commenced consistent with the transaction that is
24 being proposed.

25 Mr. McDade would testify that during the past ten

1 days, he and Lehman's senior management, have been in constant
2 communications with Lehman's regulators. The regulators are,
3 for now, very supportive of the current transaction. In an
4 effort to facilitate the transaction, the SIPC trustee agreed
5 not to freeze customer accounts when the broker-dealer was
6 placed into a SIPC proceeding.

7 The regulators and agencies support the Barclays'
8 transaction. But they have made clear to Lehman that their
9 patience is limited and they are placing tremendous pressure on
10 all parties to close a transaction no later than today. The
11 state of Lehman's affairs have been widely publicized the world
12 over.

13 It has been widely reported in the media that Lehman,
14 its senior management and advisors have participated in
15 numerous meetings conducted by the Federal Reserve Bank. At
16 these meetings, the Federal Reserve Bank and Lehman met with
17 numerous financial institutions to attempt to find the solution
18 to the problem of Lehman's financial condition.

19 Also, as widely reported in the media, the financial
20 institutions that participated in those meetings included some
21 of the largest banks in the country.

22 Notwithstanding the help from regulators and other
23 governmental agencies, Lehman was not successful in reaching an
24 agreement with any of these parties as to a support for
25 continued operations.

1 Mr. McDade would testify that he first became
2 involved with this particular transaction Monday morning --
3 last Monday morning, I guess that was September 15, at 7 a.m.
4 in the morning. Since that time, he has been in constant
5 contact with senior management and Lehman's outside advisors
6 regarding the status and progression of the negotiations. The
7 negotiations leading up to the Barclays' transaction have been
8 at arm's length, objective, aggressively pursued by Barclays
9 and difficult, to say the least, Your Honor.

10 He would testify that since the collapse of Bear
11 Stearns and a subsequent takeover by JPMorgan, the Federal
12 Reserve Bank has made financing available to broker-dealers in
13 what is colloquially referred to as the window.

14 After the broker-dealer settles its trade at the
15 close of business, the clearing bank returns the collateral,
16 which Lehman then transfers to the Federal Reserve in exchange
17 for financing until the opening of business the next day. That
18 process, as the liquidity of Lehman's deteriorated, no longer
19 became possible.

20 He would testify that in the climate of today's
21 market, a potential buyer of the broker-dealer business could
22 not operate without having access to the PDCF, the Primary
23 Dealer Credit Facility. That facility is not available to all
24 broker-dealers. Rather, it is available only to a limited
25 number of financial institutions who could meet the rules and

1 regulations of the Federal Reserve in respect thereof. And
2 that, Your Honor, is probably less than a dozen institutions.

3 He would testify that during the period of stress and
4 strain, the week before this week, Lehman attempted to interest
5 the Bank of America in an acquisition of Lehman's, and that,
6 unfortunately, did not come to fruition. At the same time, it
7 was negotiating an acquisition by Barclays of the Lehman
8 business. And that negotiation led to what I might call an
9 agreement that was subject to the -- he would testify it was
10 subject to the regulators throughout the world, and,
11 unfortunately, it became clear that that agreement could not be
12 consummated.

13 And immediately after that announcement was made, he
14 would testify that he and other officers of Lehman were called
15 to the Federal Reserve Bank in New York to meet with the
16 Federal Reserve Bank representatives, the SEC, and the United
17 States Treasury to deal with the problem confronting Lehman's.
18 And those meetings, he would testify, took place, Your Honor,
19 Sunday morning and ran into the late evening of that day. In
20 which it was made perfectly clear that it was necessary for the
21 protection of the public and the financial markets in an effort
22 to placate the public markets, or at least stabilize the
23 situation, that it is in the best interest of all parties that
24 Lehman Brothers Holdings Inc. commence a Chapter 11 proceeding.
25 And that it maintain, for LBI, access to the so-called window.

1 And it was in that context, he would testify, that LBI was
2 enabled to go forward, at least for the past week.

3 He would also testify, Your Honor, Barclays, unlike
4 some of the larger and healthier financial institutions that
5 might qualify for access to the PDCF, does not have a North
6 American broker-dealer operation of this scale. Therefore, the
7 sale is a national extension of Barclays' business. Barclays
8 would have access to the PDCF and also will assume Lehman's
9 broad spectrum broker-dealer license.

10 Not only is this sale a good match economically but
11 it saves the jobs of thousands of employees and avoids losses
12 that could total in the hundreds of billions of dollars.

13 He would further testify, Your Honor, that he is
14 familiar with the asset purchase agreement, that he
15 participated in all of the negotiations involved in the asset
16 purchase agreement. And that those negotiations from time to
17 time broke out into different teams, but he was the team leader
18 for Lehman.

19 He would testify that the asset purchase agreement
20 provides for the sale of the North American broker-dealer
21 business of LBI, which includes banking and capital markets
22 business in addition to numerous other divisions.

23 The Seventh Avenue headquarters is being transferred
24 to Barclays, in addition to the various offices located
25 throughout the United States, that are integral to the broker-

1 dealer business. The value of the real estate being
2 transferred to Barclays pursuant to the transaction is subject
3 to negotiation with respect of the appraised values. That the
4 building on Seventh Avenue is subject to an appraisal which has
5 been provided to Barclays. And that appraisal is in the area
6 of 900 million dollars to 100 million dollars. And that the
7 appraisal was done by CB Richard Ellis. And it was prepared
8 for the other debtor in this case, LB 745 LLC and Barclays
9 Capital Inc. And it is a voluminous appraisal of the
10 properties which we will offer into evidence at the appropriate
11 time, Your Honor.

12 And that he would also testify that an appraisal of
13 the two data centers was also directed and that CB Richard
14 Ellis was also engaged to undertake that appraisal. And that
15 appraisal has established the value for the purpose of the
16 negotiations, Your Honor. And as pointed out earlier in the
17 proceeding, those values have come in at slightly less -- I
18 shouldn't say slightly, less than was originally projected.

19 So that was a very negotiated term, and the reason
20 for the transfer of these properties, Your Honor, is that they
21 are integral to the smooth transition of the businesses.

22 Barclays will also assume exposure for the employees
23 that accept offers of employment, which is estimated to have a
24 value of approximately -- an exposure of approximately two
25 billion dollars.

1 Barclays is also assuming the cure amounts relating
2 to contracts and leases that will be assumed pursuant to the
3 asset purchase agreement. And that has a potential exposure,
4 Your Honor, of 1.5 billion dollars that he would testify to.

5 Barclays is also paying the real estate transfer
6 taxes, which are estimated to be approximately thirty million
7 dollars.

8 Mr. McDade would testify that the financial community
9 has known that Lehman has been under stress for some time.
10 Certainly, going back to the time that Bear Sterns was bailed
11 out. Potential purchasers have known that Lehman has been
12 searching for a buyer since well before the Chapter 11 case
13 commenced. And that those ethics, those strategic alternatives
14 that were being pursued involved parts of Lehman as well as the
15 whole of Lehman. And that the notoriety attached to that did
16 not produce any interested parties other than the ones I
17 mentioned -- he mentioned.

18 During the meeting at the Federal Reserve Bank last
19 week, Bank of America, JPMorgan, Merrill Lynch and Barclays
20 were all present, showing interest in the broker-dealer assets.
21 It was clear to each party that if Lehman was unable to reach a
22 deal it would most likely have to commence cases under Chapter
23 11 of the Bankruptcy Code. That would not only have an adverse
24 impact upon their businesses but also upon the international
25 markets.

1 He would testify that since the commencement of the
2 Chapter 11 case, Lehman's senior management and its advisors
3 have not undertaken an intensive marketing of the business and
4 the assets to be sold. But instead focused on reaching an
5 agreement with the most eligible interested buyer for these
6 assets.

7 That notwithstanding the lack of a specific program
8 for marketing, the sale of Lehman's broker-dealer business has
9 been known worldwide. And, yet, he would say nobody has
10 expressed an interest to step into the shoes of -- excuse me,
11 step into the shoes of Barclays, Your Honor.

12 Lehman has not received any other interest since the
13 commencement of the Chapter 11 cases. If Lehman was approached
14 by another potential buyer that he would consider the offer,
15 provided that the company had sufficient liquidity to operate
16 the business without jeopardizing customer accounts. That has
17 not happened, Your Honor. So it is almost academic.

18 Mr. McDade would testify, Your Honor, that if the
19 sale with Barclays is consummated, customer accounts would
20 continue on a seamless, uninterrupted basis and trading would
21 continue on a normal basis, thereby maintaining the billions of
22 dollars in value.

23 At the same time, the jobs of thousands of employees
24 would be saved and will be entitled to substantial benefits
25 from Barclays in the form of compensation, bonuses and

1 severance payments that are based upon the employee's prior
2 performance while with Lehman.

3 He would testify to the consummation of the
4 transactions makes available a greater pool of assets to the
5 debtors' estates, because the exposure under Lehman Holdings
6 guarantee to the broker-dealer will be substantially less. If
7 the transaction does not close today or over this weekend, Your
8 Honor, Mr. McDade would testify that the effect on the broker-
9 dealers business and on Lehman Holdings would be devastating.
10 First, the failure to consummate the transaction would cause
11 default under the DIP facility and require Lehman Holdings to
12 repay the outstanding amounts under that facility.

13 He would testify that the liabilities in the hundreds
14 of billions of dollars would be triggered against Lehman
15 Holdings which would in turn deplete the property available to
16 distribution to creditors. It would adversely affect the
17 debtors other nondebtor subsidiaries to the extent they have
18 any value.

19 He would testify, Your Honor, that if the transaction
20 is not consummated, it will result in the largest failure of a
21 broker-dealer in the history of the United States and will
22 cripple the credit markets for some time to come.

23 He would further testify, Your Honor, that the shock
24 of this transaction not being consummated in the public markets
25 could be immeasurable and could ignite a panic in the financial

1 condition that we now face in the United States.

2 He would testify that it is essential to an orderly
3 financial market that this transaction be consummated as early
4 as possible in the interest of all stakeholders of these two
5 cases. And in the interest of the public in general and the
6 economy in general, and to avoid a dislocation in the market,
7 Your Honor.

8 Thank you, Your Honor.

9 THE COURT: And that concludes the proffer?

10 MR. MILLER: Yes, Your Honor.

11 THE COURT: Is there anyone who wishes to cross-
12 examine Mr. McDade with respect to the proffer or may I simply
13 accept the proffer in the form it has been offered by Mr.
14 Miller without further examination?

15 MR. QURESHI: Your Honor, Abid Qureshi, Akin, Gump,
16 Strauss, Hauer & Feld on behalf of an ad hoc group of
17 noteholders of LBHI. We would like to cross-examine the
18 witness.

19 THE COURT: All right. Mr. McDade should come to the
20 stand then.

21 (Witness is sworn)

22 CROSS-EXAMINATION

23 BY MR. QURESHI:

24 Q. Good evening, Mr. McDade. You testified through the
25 proffer that you were involved in the negotiations concerning

1 the asset purchase agreement, correct?

2 A. That's correct.

3 Q. And, sir, did you also attend a meeting that was held with
4 creditors this past Wednesday at Weil Gotshal?

5 A. Yes, I did.

6 Q. I'd like to talk first, if we could, about the real estate
7 assets. What was the expectation of the debtors with respect
8 to the headquarter's building at 745 Seventh Avenue at the time
9 the original asset purchase agreement was signed up with
10 Barclays in terms of the value of that building?

11 A. The headquarters building, approximately a billion
12 dollars.

13 Q. So that was the expectation at the time that you first
14 entered into the asset purchase agreement with Barclays?

15 A. That's correct.

16 Q. And at that time, sir, what was the debtors' expectation
17 concerning the value of the two other real estate assets
18 located in New Jersey?

19 A. The two data centers totaled 450 million.

20 Q. And is it your testimony today, sir, that the appraisal
21 with respect to the headquarters building performed by CBRE
22 appraised the value at 900 million, is that correct?

23 A. I don't know.

24 Q. You don't know what the appraised value is? Do you
25 know -- were you involved with discussions with Barclays

1 concerning the appraised value of the headquarters building?

2 A. I was involved with the negotiations in terms of the
3 process with respect to the purchase of the building and the
4 process with respect to getting the appraised value. I have
5 not been involved since, directly. The team has.

6 Q. Do you know if the appraised value, whatever it is, of the
7 headquarters building, is something that has been agreed upon
8 between Lehman and Barclays?

9 A. The appraised value of the building is still to be
10 negotiated, as Mr. Miller suggested earlier.

11 Q. So you do not know what CBRE concluded the appraised value
12 was in their review of the headquarters building?

13 A. The team has been involved in that, I have not been
14 directly involved.

15 Q. Okay. Sir, with respect to the two buildings located in
16 New Jersey, are you aware of what the appraised value is of
17 those buildings?

18 A. I would answer in the same way, the team has been
19 involved.

20 Q. You personally have not?

21 A. Correct.

22 Q. And, again, Lehman's expectation going in was that the
23 approximate value of those two building was 450 million?

24 A. That's correct.

25 Q. And is it your understanding that it's materially less

1 than that today?

2 A. Materially less -- again, I have not seen the final
3 documents in terms of the appraisal.

4 Q. Okay. With respect to the appraisals of those two
5 buildings in New Jersey, again, has that appraised value,
6 although it's an unknown to you, do you know whether that
7 appraised value has been agreed upon between Barclays and --

8 A. No, it has not, to be negotiated.

9 Q. Okay. Is it your understanding, sir, that with respect to
10 the transfer of these real estate assets to Barclays that there
11 is any broker fee involved?

12 A. My understanding is from the negotiation, again, that a
13 suggested broker fee was part of the negotiation to take place,
14 yes.

15 Q. And do you know what the magnitude of that suggested
16 broker fee is?

17 A. I do not.

18 Q. Okay. Do you have any approximate idea of what it might
19 be? Are we talking tens of millions, fifty million or do we
20 not know?

21 A. I do not know.

22 Q. Okay. Is it your understanding, sir, that there actually
23 will be a broker fee payable to a broker as a result of the
24 transfer of these assets?

25 A. There is not an individual broker involved.

1 Q. So there is no actual broker fee that will be paid, but
2 value will be deducted from the appraised value for the benefit
3 of Barclays, is that correct?

4 A. That's correct.

5 Q. Sir, just to switch gears and to talk about the businesses
6 that are being sold from LBI to Barclays, are there any
7 businesses remaining at LBI that are not being transferred to
8 Barclays?

9 A. No.

10 Q. And with respect to the contracts that are associated with
11 each of the various businesses that are being acquired by
12 Barclays, do each of those contracts also reside at LBI?

13 A. The contracts with respect to the underlying products?

14 Q. Let's start more broadly, the contracts with respect to
15 the running of each of those businesses, generally?

16 A. I'm not quite certain I understand the specifics of the
17 question. The assets of those business units, the people of
18 the business units will be moving to Barclays. The individual
19 businesses have different assets and securities and
20 derivatives, obviously, that they're responsible for trading.
21 The contracts, themselves, in terms of the business units, I'm
22 not certain I understand the question.

23 Q. Okay. Are the trading contracts with respect to the
24 various products that each of those businesses operates in, are
25 those contracts going to the purchaser?

1 A. The specific question has yet to be determined, given the
2 dynamic nature and speed of which we're operating. Each of the
3 individual businesses will enter into a series of very quick
4 next steps to determine how we actually transact in each of
5 those business units going forward.

6 Q. And who will determine which of those contracts go to the
7 purchaser and which of those contracts stay behind? Will that
8 be something in Barclays' discretion, or is that Lehman's
9 decision?

10 A. That will be a mutual process.

11 Q. And is it your understanding, sir, that all of the
12 contracts that are to be negotiated, in terms of whether they
13 stay or whether they go, are contracts that reside at LBI? Or
14 are any of those contracts that reside at other Lehman
15 entities?

16 A. LBI.

17 Q. And, sir, can you also please confirm if it is your
18 understanding that the purchased assets do not include
19 Neuberger Berman or any of its assets?

20 A. Yes, I affirm that.

21 Q. Okay. Sir, are you aware of whether -- do you know what a
22 closing balance sheet is?

23 A. Yes, I do.

24 Q. Okay. And do you know whether a closing balance sheet was
25 prepared in connection with this transaction?

1 A. I am not aware of that.

2 Q. Okay. Assuming that one was not, do you have any
3 understanding of why one was not?

4 A. The speed of which we're operating.

5 Q. Well, in the absence of a closing balance sheet having
6 been prepared, can you please describe for the Court how it is
7 that the debtor determined that fair value was being realized
8 for the sale of these assets?

9 A. For the assets?

10 Q. Yes.

11 A. The individual assets on the balance sheet, the trading
12 inventory was bottoms up, meaning individual line item detail
13 processed through all of our individual risk business units in
14 coordination with the normal finance professionals who are
15 incorporated into the valuation process.

16 Q. Did the debtors have any form of valuations of any of the
17 assets that are being transferred?

18 A. Sorry?

19 Q. Does Lehman have any valuations -- internal valuations of
20 any of the assets that are being transferred to Barclays?

21 A. Absolutely. There are many complex securities involved.
22 Many different models that we use to evaluate those securities.

23 Q. And so, sir, is it your testimony then that a valuation
24 was conducted within Lehman of all of the assets that are being
25 transferred to Barclays? When was that conducted?

1 A. Portfolio moved during the week, but that was conducted
2 all last evening. All through and up to the arrangement -- the
3 agreement today.

4 Q. And, sir, was it the case that at the time of the meeting
5 that took place with creditors this past Wednesday, LBI had
6 approximately --

7 MR. MILLER: Excuse me, Your Honor, Thursday.

8 MR. QURESHI: I apologize, it was Thursday.

9 THE COURT: I'll take that as an objection to the
10 question, and it's sustained.

11 Q. Am I correct, sir, in understanding that at that time
12 creditors were told that LBI had approximately 1.3 billion
13 dollars in cash?

14 A. That's correct.

15 Q. Okay. And at that time, the deal was that 700 million of
16 those funds would go to Barclays, and the remaining 600 million
17 would stay at LBI?

18 A. That's correct.

19 Q. And what is the cash balance at LBI today?

20 A. It's virtually nil.

21 Q. Where did it go?

22 A. To the CME. Liquidation of the CME trades. And to all
23 the other clearing banks involved in processing of the
24 transactions this week.

25 Q. Sir, since the time that the agreement was first entered

1 into with Barclays early in the week, are you aware of any
2 affirmative efforts of having been undertaken on behalf of
3 Lehman to shop these assets to any other potential purchasers?

4 A. The assets, specifically, the inventory assets?

5 Q. The assets being acquired by Barclays or any subset of
6 those?

7 A. No. Nor -- no.

8 MR. QURESHI: Your Honor, may I have one moment,
9 please?

10 THE COURT: Sure.

11 Q. Sir, are you familiar, generally, with the terms of the
12 DIP financing agreement?

13 A. Generally.

14 Q. Okay. Is it your understanding that if the transaction
15 with Barclays does not close, that that would constitute a
16 default under the DIP?

17 A. Thirty days to repay. It's thirty days to repay.

18 Q. So it would trigger a thirty-day repayment of it?

19 A. Yes.

20 Q. Okay.

21 MR. QURESHI: Thank you, Your Honor, that's all I
22 have.

23 THE COURT: Is there anyone else who wishes to
24 examine the witness?

25 MR. ROSNER: Your Honor, if you can see me, I'm right

1 here. I'd like to --

2 THE COURT: Well, Mr. Bienenstock is ahead of you.
3 So you're going to have to move to a position where you can
4 both be seen and heard.

5 Mr. Bienenstock, it's your turn.

6 MR. BIENENSTOCK: Thank you, Your Honor.

7 CROSS-EXAMINATION

8 BY MR. BIENENSTOCK:

9 Q. Good evening, Mr. McDade.

10 A. Good evening.

11 Q. My name is Martin Bienenstock, representing the Walt
12 Disney Company. Yesterday, I understand that you were at the
13 information session at Weil Gotshal?

14 A. That's correct.

15 Q. And I want to confirm some information given there.
16 Pursuant to the proposed asset purchase agreement here, the
17 businesses that are being -- the Lehman businesses being
18 transferred to Barclays are as follows: Tell me if I'm
19 incorrect, I'll read one at a time. Investment Banking?

20 A. Correct.

21 Q. Fixed Income?

22 A. Correct.

23 Q. North American Operations?

24 A. Correct.

25 Q. Credit?

- 1 A. Correct.
- 2 Q. Lending?
- 3 A. Correct.
- 4 Q. Municipal Bonds?
- 5 A. Yes.
- 6 Q. Commodities?
- 7 A. Correct.
- 8 Q. High Yield?
- 9 A. Yes.
- 10 Q. Derivatives?
- 11 A. Yes.
- 12 Q. Government Bonds?
- 13 A. Yes.
- 14 Q. Interest rates derivatives?
- 15 A. Yes.
- 16 Q. High grade credit?
- 17 A. Yes.
- 18 Q. Cash and credit derivatives?
- 19 A. Yes.
- 20 Q. Money market?
- 21 A. Yes.
- 22 Q. Commercial paper?
- 23 A. That's the same.
- 24 Q. Commercial lending?
- 25 A. Commercial lending, if you mean the leverage finance

1 business, yes.

2 Q. Foreign exchange trading?

3 A. Yes.

4 Q. Prime brokerage?

5 A. Yes.

6 Q. Prime services?

7 A. That's the same business.

8 Q. Sorry, I'm not familiar.

9 A. No problem.

10 Q. Cash equities?

11 A. Correct.

12 Q. Convertible bonds?

13 A. Yes.

14 Q. Long/short proprietary trading?

15 A. Yes.

16 Q. Customer options and futures?

17 A. Yes.

18 Q. Equity prime brokerage?

19 A. Yes.

20 Q. And to transfer those businesses, I take it, the one

21 necessary component is the transfer of employees to Barclay?

22 A. Absolutely.

23 Q. And how many employees did you say will be going over to

24 Barclays?

25 A. Approximately 9,000.

1 Q. And at Lehman Brothers and its subsidiary entities, do
2 employees work across legal entities in business lines or is
3 there a different employee for each legal entity?

4 A. Most of the employees in the U.S. work for the U.S.
5 broker-dealer, LBI. Most of the LBH employees were actually
6 corporate functions, operations financed technology which
7 supported the capital markets units in particular.

8 Q. So the employees then who worked for Lehman Brothers
9 Commercial Corp. are technically employees of LBI, is that
10 correct?

11 A. Lehman Brothers Commercial Corp.?

12 Q. Yes.

13 A. I'm not familiar with that legal entity.

14 Q. Foreign exchange trading?

15 A. Foreign exchange trading, yes.

16 Q. Okay. And Lehman Brothers Finance, are those employees
17 employees of -- are the employees who operate Lehman Brothers
18 Finance, are they employees of LBI?

19 A. Lehman Brothers Finance, you mean the finance professional
20 staff?

21 Q. I think the technical name is Lehman Brothers Finance S.A.

22 A. Lehman Brothers Finance S.A. is one of our derivative
23 subsidiaries.

24 Q. Okay. And the employees who work that business are
25 employees of LBI?

1 A. Correct.

2 Q. And the same goes for Lehman Brothers Equity Finance

3 (Cayman) Ltd.?

4 A. Correct.

5 Q. And for Lehman Brothers Commercial Corporation Asia Ltd.?

6 A. Correct.

7 Q. And for Lehman Brothers Bankhaus A.G. Seoul branch?

8 A. That's a funding vehicle, it's a bank.

9 Q. Okay. And for Lehman Brothers Commodity Services, Inc.?

10 A. That's correct.

11 Q. Are you sure you have no recollection of Lehman Brothers

12 Commercial Corp., LBCC?

13 A. No, I do not.

14 Q. Okay. But, in general, the subsidiaries of Lehman

15 Brothers Inc. and Lehman Brothers Holdings Inc. use employees

16 of those two entities?

17 A. That's correct.

18 Q. So as a consequence of this asset purchase agreement if

19 it's closed, the businesses and those subsidiaries will have to

20 be wound down, is that fair?

21 A. The businesses in the subsidiaries?

22 Q. Yes.

23 A. The vehicles themselves?

24 Q. Well, let me ask it this way. Those subsidiaries will

25 stop transacting new business, I take it?

1 A. If Barclays so chooses, yes, that's correct. In terms of
2 the process.

3 Q. Okay.

4 A. We're still in a period, obviously, of working through the
5 dynamic of how the Barclays/Lehman integration, if it were to
6 happen, would take place.

7 Q. And along with the sale, what was referred to, I think at
8 the information session, as the infrastructure, which I take it
9 are the data processing and other items that enable the
10 businesses to work, that's being transferred over to Barclays?

11 A. That's correct.

12 Q. And that would apply -- and that's the same infrastructure
13 that enables the subsidiary's businesses to work, is that
14 correct?

15 A. Very different infrastructure, it's trading infrastructure
16 in particular. So trading platforms. The reason the data
17 centers are so important is the volume of electronic trading
18 taking place, for example, in equities. So it's a very
19 different infrastructure.

20 Q. Okay. Let me clarify that. Are you saying that the
21 infrastructure that's moving over to Barclays to cover all the
22 list of businesses that you agreed were being transferred, is
23 different than the infrastructure that helps run the
24 subsidiaries?

25 A. I'm sorry. There are different forms of infrastructure,

1 it's a broad term covering a lot of different aspects of
2 responsibilities for running these businesses.

3 Q. But the infrastructure for running all of the businesses
4 we went through at the outset is moving over to Barclays?

5 A. That's correct.

6 Q. At I think it's LH 745, the owner of the headquarter
7 building, who was that note payable to?

8 A. The intercompany?

9 Q. Yes.

10 A. I don't know the specifics.

11 Q. Do you know whether the money will be -- do you know
12 whether that note payable will be satisfied at closing?

13 A. I believe it's already been -- I believe it was already
14 answered earlier that it was satisfied previously at this
15 point. I don't know specifically.

16 Q. There was lawyer's colloquy, but I just want to -- this is
17 the evidence part.

18 A. I do not know specifically.

19 Q. Okay. In running the businesses that we spoke about
20 earlier, would you agree that it's the employees that are
21 critically important?

22 A. Absolutely.

23 Q. When you negotiated this deal with Barclays, tell me, were
24 you at the table?

25 A. Absolutely.

1 Q. Okay. And who were you negotiating on behalf of?

2 A. I was negotiating on behalf of the estate.

3 Q. The estate of LBHI?

4 A. There were two phases of the negotiation. The weekend
5 conversations, which obviously did not transpire. And then
6 this phase of the negotiations.

7 Q. When you refer to estate, is it fair to say you meant
8 Lehman Brothers Holdings Inc. --

9 A. Correct.

10 Q. -- and Lehman Brothers Inc., and Lehman Brothers 745?

11 A. Correct.

12 MR. BIENENSTOCK: No further questions, Your Honor.

13 THE COURT: Thank you. Mr. Sabin, are you going to
14 question?

15 MR. SABIN: I do, Your Honor.

16 THE COURT: What happened to that gentleman that
17 raised his hand and sat down --

18 MR. ROSNER: I'm sorry. I think Mr. Sabin was
19 prepared to go next. So if that's okay with Your Honor, it's
20 certainly okay --

21 THE COURT: It's perfectly fine. You just seemed
22 very interested to be the one who was going to take Mr.
23 Bienenstock's spot.

24 MR. ROSNER: No, it's just sometimes I'm hard to be
25 seen.

1 THE COURT: Okay. Well, you'll be next if you want
2 to be.

3 MR. ROSNER: Thank you, Your Honor.

4 CROSS-EXAMINATION

5 BY MR. SABIN:

6 Q. Mr. McDade, good evening. I'll try to be brief. Are you
7 familiar with the conditions to closing of this proposed
8 transaction?

9 A. (No verbal response)

10 Q. And is it fair to say that one of those conditions require
11 a certain level of employees to be identified and to be
12 anticipated to go to becoming employed by Barclays?

13 A. That's correct.

14 Q. In your view as of today, is that condition satisfied or
15 capable of being satisfied?

16 A. That condition is still being worked through. You'd have
17 to speak to Barclays in terms of the specifics of their
18 satisfaction.

19 Q. Let's just assume for the moment that that condition could
20 be satisfied, are the employees who that condition speaks of
21 and identifies in any way, shape or form necessary to the
22 continued operation of any of the existing subsidiaries of LBI
23 today?

24 A. No.

25 Q. Lastly, Mr. McDade, there is a condition that was

1 negotiated that otherwise requires before Barclays funds, that
2 this Court had entered a final order with respect to certain
3 aspects of the sale. Has Barclays indicated to you that if
4 there were an appeal that they would close in the face of an
5 appeal if it were not safe?

6 A. I have not been part of that type of discussion.

7 MR. SABIN: I have no further questions. Thank you.

8 THE COURT: Please state your name?

9 MR. ROSNER: Sure. Good evening, Your Honor. David
10 Rosner from Kasowitz, Benson, Torres & Friedman.

11 MR. MILLER: Your Honor, do we know who Mr. Rosner
12 represents?

13 THE COURT: He filed an objection which I saw and
14 read. But who do you represent?

15 MR. ROSNER: Apparently, Mr. Miller didn't get a
16 chance to read it.

17 THE COURT: He's been busier than I have been. I've
18 been preparing for this hearing and he's been doing other
19 things as well.

20 MR. ROSNER: Bay Harbour, there's four Bay Harbour
21 entities that are identified. And actually I just have a few
22 questions.

23 CROSS-EXAMINATION

24 BY MR. ROSNER:

25 Q. At what point did Barclays express interest in any part of

1 Lehmans?

2 A. In any part of Lehman, the discussion started last Friday
3 evening.

4 Q. Did Barclay sign a confidentiality agreement?

5 A. Yes, it did.

6 Q. Did you see that confidentiality agreement?

7 A. No, I did not.

8 Q. Do you know when it was signed?

9 A. No, I do not. I assume Friday.

10 Q. Do you know if it was signed before they got access to any
11 information from Lehmans?

12 A. I do not know.

13 Q. When did they actually get access to Lehman confidential
14 information?

15 A. I do not know.

16 Q. You weren't involved in the process at all of providing
17 confidential information to --

18 A. When that process started I was negotiating with another
19 party.

20 Q. Do you know what Lehman did in -- I'm sorry, do you know
21 what Barclays did in terms of seeking information from Lehmans?

22 A. Do I know the specifics --

23 MR. MILLER: Your Honor, please, can we identify in
24 connection to what transaction?

25 MR. ROSNER: I'm sorry?

1 MR. MILLER: In connection with which transaction?

2 MR. ROSNER: In connection with the transaction that
3 we have here today.

4 THE COURT: Okay. It's an objection. The question
5 has been clarified. Is the objection withdrawn as a result of
6 that?

7 MR. MILLER: Yes, sir.

8 MR. ROSNER: Okay.

9 Q. I'm sorry, was I not clear in the question? I want to be
10 clear, so if I'm not clear please feel free to interrupt.

11 A. I think it's important to note there were two sets of
12 discussions. The first over the weekend, organized
13 specifically on behalf of the markets and energized by the
14 Federal Reserve and other regulatory bodies. Those discussions
15 ended without a transaction, new discussions began the next
16 morning.

17 Q. Okay.

18 A. The information used in both of those processes were
19 reasonably similar, obviously with any updates that might have
20 been appropriate.

21 Q. Got you. Was there an amendment to a confidentiality
22 agreement, or was there --

23 A. Again, I was not directly part of those conversations.

24 Q. Are you aware of anything that Barclays asked for from
25 Lehman that Lehman did not provide in terms of information in

1 order to make an assessment as to whether to go forward with a
2 transaction?

3 A. I'm not specifically aware of anything that they asked for
4 that we could not provide.

5 Q. Are you aware of whether they asked for or were given
6 information regarding intercompany transactions?

7 A. I'm not aware specifically.

8 Q. Does that include intercompany payables?

9 A. Again, not aware specifically.

10 Q. And intercompany receivables as well?

11 A. Yes, sir.

12 Q. Okay. Are you aware today if there's an intercompany
13 payable to what I'll call LB -- do you know what I mean by
14 LBIE?

15 A. Yes.

16 Q. Are you aware today whether there's an intercompany
17 payable to LBIE by either of the debtor entities?

18 A. Yes.

19 Q. How much is it?

20 A. Approximately five billion.

21 Q. And where did that one arise?

22 A. I'm sorry?

23 Q. Where did that -- I'm sorry. Where did that intercompany
24 payable arise? From where did that intercompany payable arise?

25 A. I think it's a series of transactions. I'm not aware of

1 the specifics.

2 Q. Are you aware of any of the specifics?

3 A. No.

4 Q. Not a single one?

5 A. With respect to the intercompany?

6 Q. With respect to the intercompany payable from these

7 debtors to LBIE?

8 A. I know the notional amount.

9 Q. Okay.

10 A. Five billion.

11 Q. Do you know if money was transferred from LBIE to the

12 debtor entities on Friday, the last week?

13 A. I'm not involved in the day-to-day process of financing

14 the firm.

15 Q. But my question was whether you were aware of that?

16 A. No, I'm not specifically aware.

17 Q. Have you read anything about that?

18 A. Absolutely.

19 Q. You have read something about that?

20 A. Have I read it in the media, is that what you're referring

21 to?

22 Q. Yes.

23 A. Yes.

24 Q. And you did testify that you were at the meeting yesterday

25 at Weil Gotshal?

1 A. I was at an afternoon session. My understanding is there
2 was more than one session.

3 Q. And these questions were asked as to the intercompany
4 payable, correct?

5 A. Uh-huh.

6 Q. And do you recall whether --

7 THE COURT: You have to answer with more than a nod
8 of the head. Thanks.

9 THE WITNESS: Sorry.

10 Q. And do you recall whether this information that I'm asking
11 now was given yesterday at the information center?

12 A. It was not given yesterday.

13 Q. Which debtor entity owes that money to LBIE?

14 A. LBI is a payable to LBIE.

15 Q. And what about Holdings?

16 A. LBIE is a payable to LB Holdings.

17 Q. And how much is that?

18 A. Eight billion.

19 Q. And do you know what that's derived from?

20 A. No.

21 Q. Did you do an audit of the -- I'm sorry. Has an audit
22 been accomplished of the securities that are to be transferred
23 to Barclays under the proposed transactions?

24 A. If you mean an audit by external valuation process?

25 Q. By identification of the securities?

1 A. Absolutely, line by line.

2 Q. I think during your proffer it was stated that you are
3 familiar with the contract. I assume that means you don't know
4 every line but you are generally familiar with the contract
5 that's before the Court today, is that a fair statement?

6 A. Yes.

7 Q. Are you aware of the closing conditions under the
8 contract?

9 A. I believe so.

10 Q. Are they all satisfied as of today, subject to the entry
11 of an order by this Court?

12 A. With respect to all those that I have knowledge of, yes.

13 Q. And I think there was a question, but I just want to be
14 clear. There is a closing condition regarding eight employees
15 signing up agreements, is that correct?

16 A. That is correct.

17 Q. And I might have missed this before, and have all of those
18 eight employees been signed up?

19 A. We expect no issues with respect to the employment
20 services needs to close.

21 Q. Okay. So as of sitting here right now, that condition has
22 not been met?

23 A. We expect no issues.

24 Q. For the record, it's a yes or no and I just want to make
25 it clear on the record?

1 A. I do not have the specific information with respect to
2 either the exact number of those participants or with respect
3 to Barclays' view as to whether that would be waived if,
4 indeed, that became an issue.

5 MR. ROSNER: Okay. I have nothing further, Your
6 Honor. Thank you.

7 THE COURT: Okay, thank you. Is there anyone else
8 that wishes to examine Mr. McDade? Come forward. Please state
9 your name and identity of the client that you're here to
10 represent.

11 MR. BYRNE: Yes, Your Honor, good afternoon. Larry
12 Byrne from Linklaters. Linklaters, Your Honor, represents the
13 administrators who have been appointed to supervise the
14 insolvency of four Lehman Brothers entities in the U.K. and in
15 Europe.

16 THE COURT: These are the Pricewaterhouse people?

17 MR. BYRNE: Yes, Your Honor.

18 THE COURT: Okay.

19 MR. BYRNE: So we act for Pricewaterhouse who are now
20 the insolvency administrators in the U.K. for these four Lehman
21 Brothers entities who are affiliates of subsidiaries of the
22 debtors.

23 THE COURT: Okay. You may proceed with your
24 questions.

25 CROSS-EXAMINATION

1 BY MR. BYRNE:

2 Q. Good evening, Mr. McDade. The hour's late, so I have just
3 a few questions for you following up on the previous questions.

4 You referred to an intercompany payable in the amount of
5 five billion and an intercompany payable in the amount of eight
6 billion. Do you know when those payables first arose or came
7 into existence?

8 A. No, I do not.

9 Q. When did you first become aware of them?

10 MR. MILLER: Excuse me, Your Honor. I'm not quite
11 sure I understand how that relates to whether the sale should
12 be approved or not. It seems to be the administrator in London
13 is trying to find out information concerning whether it has a
14 claim against this estate, what's going to happen to that
15 claim. It doesn't go to this transaction.

16 THE COURT: Well, let me observe that I have read a
17 number of objections that have raised questions concerning
18 whether this transaction, if approved, would affect the ability
19 of parties-in-interest, including the Pricewaterhouse foreign
20 representatives, I'll call them for these purposes, in being
21 able to pursue a claim for recovery in this estate of the eight
22 billion dollars that, according to the objection that I read,
23 was allegedly swept from LBIE on Friday, a week ago, to the
24 accounts of LBH. And that didn't come back to LBIE on Monday
25 presumably as a consequence of the bankruptcy filing. And so I

1 don't know that this goes to the reasonableness of the debtors'
2 business judgment in proposing that this transaction be
3 approved this evening, as much as it goes to the legal affect
4 of such approval in light of the ambiguities -- alleged
5 ambiguities and vagueness -- the alleged vagueness of the asset
6 purchase agreement and the various documents that have been
7 offered up to parties-in-interest.

8 So with that, I overrule your comment and will permit
9 the examination.

10 MR. BYRNE: Thank you, Your Honor. May I proceed?

11 THE COURT: Yes.

12 BY MR. BYRNE:

13 Q. When did you first become aware of these two intercompany
14 payables, the eight billion, the five billion, apart from press
15 reports?

16 A. I followed up post the session that we had yesterday to
17 make sure I had the information.

18 Q. And what information did you learn as a result of that
19 follow-up?

20 A. The previous statements that I made with respect to the
21 nominal amounts.

22 Q. I'm not sure I understand what you're saying.

23 A. LBI has a payable to LBIE. LBIE has a payable to LBH.
24 Those are the figures and data that I researched.

25 Q. And following up to confirm those figures and data, what

1 is it that you looked at?

2 A. I looked at a summary finance document from one of our
3 senior finance officers.

4 Q. That's an internal document at Lehman?

5 A. That's correct.

6 Q. And who is the senior finance officer that had prepared
7 that?

8 A. I don't know who prepared the document. The interaction I
9 had was with a gentleman named Chris O'Meara.

10 Q. I'm sorry, I couldn't hear you.

11 A. Chris O'Meara.

12 MR. BYRNE: Your Honor, I don't think I have any
13 further questions at this time. I would like an opportunity
14 either now or later just to clarify a couple of things you said
15 with respect to the PWC administrator's position. Because
16 they're actually not objecting to this transaction.

17 THE COURT: Oh, great. I assumed because you were
18 asking questions that you were getting in the way of it.

19 MR. BYRNE: No, not at all, Your Honor, we just
20 wanted clarification based on the questions that were asked
21 earlier. You may not have seen, because it did not get
22 electronically filed until shortly before the hearing, what the
23 administrators have filed, which is a response to the proposed
24 settlement, not an objection. And we say in the first line of
25 that response that the administrators have no objections to the

1 approval of this transaction this evening.

2 There are some clarifications we're going to seek,
3 but we can do that later in the proceeding with the Court's
4 permission.

5 THE COURT: Fine. The only thing I read was the
6 declaration that was filed. In order to triage the preparation
7 for this hearing, I read things that I thought would be
8 helpful.

9 MR. BYRNE: Right. We have a declaration from the
10 PWC administrator --

11 THE COURT: That's what I read.

12 MR. BYRNE: Okay. I think the transaction details
13 you're describing might have been in someone else's objection,
14 not in ours.

15 THE COURT: If I misstated the facts it's because I
16 didn't understand --

17 MR. BYRNE: Understood, Your Honor. I have nothing
18 further at this time, Your Honor.

19 THE COURT: Okay. Is there anyone else that would --
20 Ms. Granfield?

21 MS. GRANFIELD: Good evening, Your Honor. Lindsay
22 Granfield, Cleary Gottlieb Steen & Hamilton, LLP on behalf of
23 Barclays Capital.

24 Odd procedural posture. I think that there's going
25 to be very able -- probably not too long an able redirect by

1 the debtor. And that might make it unnecessary for me to ask
2 any questions. And, in fact, if there was a short recess, I
3 might be able to confer with Mr. Miller on what he planned to
4 cover and not make it necessary for me to ask any questions.

5 THE COURT: Well, before taking that welcomed recess,
6 because I think people are probably ready for one, let me just
7 confirm that there is no one else, other than yourself, at this
8 moment, has an interest in asking any further questions of Mr.
9 McDade?

10 MS. GRANFIELD: Very good, Your Honor.

11 THE COURT: I see no one moving in the direction of
12 the podium, and I see no one indicating an interest in asking
13 questions. So I'm going to assume that you are the last
14 possible questioner on cross. And since its now about ten
15 minutes to 8 in the evening and it is warm, and many people are
16 standing, I'm going to propose that we take a break until 8:15.
17 And we'll resume at that time.

18 MS. GRANFIELD: Thank you, Your Honor.

19 (Recess from 7:48 p.m. until 8:45 p.m.)

20 THE COURT: Be seated, please.

21 MR. MILLER: Once again, good evening, Your Honor.
22 Harvey Miller for the debtors.

23 Your Honor, in the interest of expedition, I would
24 offer into evidence the asset purchase agreement among Lehman
25 Brothers Holdings Inc., Lehman Brothers Inc., LB 745 LLC and

1 Barclays Capital, Inc. dated as of September 16, 2008 and the
2 first amendment to the asset purchase agreement among the same
3 parties, Your Honor, dated September 19, 2008.

4 THE COURT: Is there any objection to the admission
5 of the evidence of those two documents?

6 UNIDENTIFIED SPEAKER: Yeah. No, I haven't seen it.

7 UNIDENTIFIED SPEAKER: We haven't been given a copy
8 even.

9 UNIDENTIFIED SPEAKER: Same, Your Honor.

10 UNIDENTIFIED SPEAKER: Your Honor, we would have the
11 additional objection of it's unclear whether this even
12 represents the final asset purchase agreement or whether terms
13 are made to be negotiated.

14 THE COURT: I don't think it needs to represent the
15 final. It's a document that -- assuming the first one is a
16 document everybody's seen, the second one is the only document
17 that may be subject to reasonable objection. And whether or
18 not it is, in fact, the document that would govern the closing
19 is irrelevant to its admissibility. That objection is
20 overruled.

21 As far as the amendment, I'm certainly interested in
22 seeing it. I'm sure others are as well. How many copies are
23 there? Or are there copies?

24 MR. MILLER: As I said last time, Your Honor, modern
25 technology is not what it's all cracked up to be. Your Honor,

1 I have --

2 THE COURT: I would also note that copies of a
3 document, while a courtesy of counsel, are not a condition to
4 admissibility. And if an offer of proof is made as to the
5 authenticity of the document, the fact that it is what it
6 purports to be, which is the second amendment, I'm prepared to
7 admit it notwithstanding the fact that copies are not
8 available, recognizing that there is an objection that is a
9 reasonable one that all other parties to the transaction need
10 to see a copy at some point so they have reasonable notice.

11 MR. MILLER: Your Honor, I would make an offer of
12 proof that this is a document. This represents the asset
13 purchase agreement that's dated as of September 16, 2008, which
14 was attached or filed at 6 a.m., or whatever it was, in the
15 morning, a couple of days ago with a lot of interlineations.
16 This is a clean draft -- a clean copy, Your Honor. This is the
17 execution -- a copy of the execution copy.

18 THE COURT: It is the hand-marked copy typed so that
19 the edits that we saw in handwriting are now incorporated in
20 full font?

21 MR. MILLER: That is correct, Your Honor.

22 THE COURT: Okay.

23 MR. MILLER: I would represent, Your Honor, that the
24 first amendment to the asset purchase agreement, which consists
25 of exactly four pages, dated September 19 -- and this is a copy

1 of the execution copy of that document, Your Honor, which
2 clarifies certain provisions in the asset purchase agreement,
3 and, Your Honor, is part of -- an integral part of the
4 agreement and is signed on behalf of Lehman Brothers Holdings,
5 Lehman Brothers Inc., LB 745 and Barclays Capital.

6 THE COURT: May I simply ask if the witness who's on
7 the witness stand is familiar with that document or had
8 anything to do with its execution, it might be in a position to
9 further authenticate it?

10 MR. MILLER: May I approach, Your Honor?

11 THE COURT: Yes.

12 REDIRECT EXAMINATION

13 BY MR. MILLER:

14 Q. Mr. McDade, are you familiar with the fact that a first
15 amendment was made to the asset purchase agreement?

16 A. Yes, I am.

17 Q. The document which I have shown you, have you seen that
18 document before?

19 A. Yes, I have.

20 Q. Are you familiar with that document?

21 A. Yes, I am.

22 Q. Is that the first amendment to the asset purchase
23 agreement?

24 A. Yes, it is.

25 Q. That was executed on behalf of the debtors?

1 A. Yes.

2 MR. MILLER: I offer it, Your Honor.

3 THE COURT: Notwithstanding the objection that copies
4 are not available, it's admitted. So it's in evidence along
5 with that first one.

6 (Copy of execution copy of asset purchase agreement among LBHI,
7 LBI, LB 745 LLC and Barclays Capital, Inc. dated 9/16/08 and
8 first amendment thereto dated 9/19/08 were hereby received as
9 Debtor's Exhibit into evidence, as of this date.)

10 MR. MILLER: Thank you, Your Honor. If I might, Your
11 Honor, I would like to hand up copies to you on -- so that'd be
12 marked, Your Honor?

13 THE COURT: If you wish to have them marked they can
14 be marked. Thank you.

15 BY MR. MILLER:

16 Q. Mr. McDade, in your cross-examination concerning LBIE, you
17 made reference to the notional value of the payables and the
18 receivable. What did you mean by "notional value"?

19 A. The -- the notional of eight billion was the -- the
20 figure, the gross figure at the bottom of the calculation.

21 Q. Does the transaction contemplate a transition services
22 agreement?

23 A. Yes, it does.

24 Q. And what would that agreement provide?

25 A. Those would provide services to Barclays and back with

1 respect to all of the associated business responsibilities that
2 would be necessary to continue the business as it moves on --
3 the businesses as they move on.

4 Q. And is that agreement in the process of being negotiated
5 right now?

6 A. Yes, it is.

7 Q. Have you formed an opinion as to whether that will come to
8 fruition?

9 A. Yes, I did.

10 Q. And what is your opinion?

11 A. Yes, it will.

12 MR. MILLER: I have no further questions of this
13 witness, Your Honor.

14 THE COURT: Given that very limited redirect, I would
15 hope that further examination would be held to a limited period
16 given the hour. But I don't wish to restrict the examination
17 of any party-in-interest who wishes to further examine only
18 with respect to the subject of the redirect.

19 I see no interest in further questioning. I believe
20 it's now timely to excuse the witness. Mr. McDade, thank you.
21 You're excused.

22 THE WITNESS: Thank you, Your Honor.

23 MR. MILLER: Your Honor, I am pleased to announce
24 that we have reached agreement in respect of the value of the
25 real estate. As Your Honor may recall, there was a difference

1 of opinion between Barclays and Lehman. The Barclays
2 appraisal, Your Honor, which I referred to, that was made by CB
3 Richard Ellis, was an appraisal for the building and states
4 specifically in the appraisal, Your Honor, the appraisal
5 premise is as is, assuming market tenant in place.

6 I told Your Honor if there is no tenant in place the
7 value of the buildings really depreciates. That appraisal,
8 Your Honor, was one billion twenty million dollars. Barclays
9 obtained an appraisal for the building at 900 million dollars,
10 Your Honor. The parties have agreed to split the difference.
11 That's so that the value that would go to the estate, Your
12 Honor, is 960 million dollars.

13 As to the two data centers, Your Honor, Barclays has
14 agreed that the appraisal values obtained by Lehman for those
15 two properties, which total 330 thousand dollars --

16 THE COURT: Three hundred thirty million, perhaps?

17 MR. MILLER: Three hundred thirty million dollars,
18 Your Honor. It's getting late. So that there would be a
19 billion 290 -- I'm sorry, a billion 290 million dollars as the
20 purchase price, and there will be no brokers' commissions, Your
21 Honor. So that will be the amount received if this
22 transaction's consummated.

23 THE COURT: All right. So, notwithstanding some of
24 the things that came up during the opening remarks and the
25 examination of the witness, there is, at this moment, a

1 stipulation which you have put on the record that the real
2 estate component of the transaction, in the aggregate, and I
3 just want to be sure, that the number will be valued at one
4 billion 290 million dollars and there will be no commission
5 payable.

6 MR. MILLER: That is correct, Your Honor.

7 THE COURT: Fine. Thank you.

8 MR. MILLER: Okay. Your Honor, just one observation.
9 We told Your Honor that if this transaction were to be approved
10 in a relatively short period of time that, if we can, we could
11 transfer the accounts before 10:45 p.m.

12 THE COURT: Let's get to work.

13 MR. MILLER: Okay. Your Honor, our next witness
14 would be Mr. Barry W. Ridings of Lazard. And I would also,
15 Your Honor, do a fast proffer.

16 THE COURT: Is there any objection to proceeding by
17 means of a proffer with respect to Mr. Ridings' direct
18 examination?

19 There's no objection. Please proceed.

20 MR. MILLER: Your Honor, if Mr. Ridings were called
21 to testify in support of the sale motion, his direct testimony
22 would be as follows:

23 Mr. Ridings joined Lazard in July 1999; is co-head of
24 the restructuring group. He has a BA from Colgate University
25 and an MBA in finance from Cornell University.

1 From 1990 to 1999, Mr. Ridings was the managing
2 director of BT Alex. Brown and this restructuring group.

3 Before that, Mr. Ridings served as a managing
4 director in the restructuring group at Drexel Burnham and
5 Lambert. Interesting. As a result of his experiences --

6 THE COURT: At least we have somebody to point the
7 finger at.

8 MR. MILLER: As a result of the experiences at
9 Drexel, Mr. Ridings knows of the consequences of failure of a
10 major investment bank and the costs in dislocation that occur.

11 Since 1990, Lazard's professionals have been involved
12 in over 250 restructurings, representing 350 billion dollars in
13 debtors' assets.

14 Mr. Ridings is the head of Lazard's capital markets
15 group, which is the Lazard unit responsible for equity and bond
16 sales, trading and research business, which is the same
17 business being sold by LBI to Barclays.

18 Mr. Ridings has testified in many reorganization
19 cases, including Macy's, Western Union, Owens Corning, Marble
20 Entertainment, Fruit of the Loom, Sun Healthcare, Wang
21 Laboratories and Vlastic Foods.

22 He is also a former member of the board of directors
23 of the American Stock Exchange and serves on corporate boards,
24 including New Valley Corp. and other corporations.

25 Mr. Ridings has been the principal investment banker

1 on over twenty-five public offerings of high-yield debt. He
2 also has extensive experience with IPOs, opinion letters and
3 M&A transactions.

4 Lehman retained Lazard and Mr. Ridings to offer
5 investment banking and financial advice. Mr. Ridings' work in
6 this matter also involved assisting in the sale of the various
7 assets.

8 He was intimately involved in the negotiations
9 between Lehman and Barclays that resulted in the asset purchase
10 agreement. He would testify that he has become reasonably
11 familiar with Lehman's business and has reviewed the terms and
12 provisions of the asset purchase agreement with Barclays.

13 Mr. Ridings would testify that over the past year the
14 financial markets have been extremely volatile with negative
15 consequences to Lehman and other similar firms.

16 He would testify that Lehman has faced a continued
17 lack of liquidity in the credit markets, significantly
18 depressed volumes in most equity markets, a widening in fixed
19 income credit spreads compared to the end of 2007 fiscal year
20 as well as declining asset values. As a leading firm in the
21 financial markets, these factors have had a materially negative
22 impact on Lehman.

23 He would testify that there was downward pressure on
24 financial asset prices, and Lehman's inventory positions
25 diminished in value and its liquidity began to contract.

1 In addition, Lehman's transactional volumes and
2 market activity for Lehman's capital markets and investment
3 banking business segments also contracted.

4 Lehman's portfolio was particularly vulnerable
5 because it held significant volumes of illiquid residential
6 mortgages and structured credit products.

7 At the time of Lazard's engagement, he was aware that
8 Lehman's management was exploring several different options to
9 deal with the crisis. Specifically, he is aware that Lehman
10 explored selling its investment management division to raise
11 much needed liquidity, and it also considered spinning off some
12 of its illiquid real estate assets.

13 Before any of these strategic maneuvers came to
14 fruition, the company was forced to file the Chapter 11 cases
15 because its assets were rapidly depreciating and they could not
16 raise additional liquidity.

17 Mr. Ridings would also testify that the sale of LBI
18 must be immediately consummated or there will be little or
19 nothing to sell.

20 There are few potential purchasers for this business
21 because any buyer must meet regulatory requirements, have
22 sufficient capital and have the strategic capability to operate
23 the business from day one.

24 He would testify that he and other members of the
25 Lazard team were involved in the discussions and negotiations

1 with Barclays.

2 Mr. Ridings would testify that the negotiations were
3 at arm's length, difficult and aggressively negotiated by the
4 parties, that the asset purchase agreement is the result of
5 good faith negotiations.

6 He would testify that the parties worked around the
7 clock to finalize the purchase agreement because they realize
8 that time was of the essence and that the business would not
9 survive without an immediate infusion of new liquidity.

10 Between Monday and Wednesday of this week, he would
11 testify the parties exchanged numerous bids and asks and turned
12 drafts of the agreement countless times.

13 He would also testify that since executing the asset
14 purchase agreement the parties have continued to work nonstop
15 in order to prepare for closing, contracts have been identified
16 for assumption or assignment and, with the authority from the
17 Court, debtor-in-possession financing was obtained for LBHI.

18 He would testify that these assets have substantially
19 greater value if they are sold as a going concern. Despite the
20 tremendous publicity associated with this case, not one firm,
21 other than Barclays, showed up with an interest in the assets
22 as a whole. Without Barclays, Lehman would be forced to sell
23 discreet assets for a fraction of the value that will be
24 realized from this transaction.

25 By selling the business as a going concern, Lehman

1 has preserved approximately nine to ten thousand jobs for its
2 employees and avoided significant costs and claims that would
3 have resulted if there were mass layoffs and a cessation of
4 operations.

5 He would also testify that calls were placed to a
6 number of prospective bidders over this week. He would testify
7 that Lehman's situation was widely known in the financial
8 services industry and yet no one really appeared to show an
9 interest.

10 He will testify that Lazard had twenty-one contacts
11 with entities that expressed an interest but not one of them,
12 nor any other entity, had expressed the desire or ability to
13 step into Barclays' shoes.

14 Practically, he would testify there were few
15 potential purchasers for these assets. Of this universe, most
16 of the funds that could purchase these assets have their own
17 cash flow problems to contend with and are not looking to
18 expand.

19 Any prospective purchaser would need access to the
20 Federal Reserve Funds to operate Lehman's business. The list
21 of firms authorized to trade directly with the Federal Reserve
22 System and borrow from the so-called "window" is limited. Each
23 entity must meet stringent capital and regulatory requirements.

24 He would testify that, in his opinion, Barclays'
25 offer is the highest and best offer for these assets.

1 Lehman is selling its North American investment
2 banking and capital markets business. This business focuses on
3 fixed income, equities, trading, advisory services, futures and
4 investment banking. The costs to Lehman and counterparties, as
5 pending transactions unwind, if this transaction is not
6 approved, will run into the many billions of dollars.
7 Counterparties will be required to liquidate their collateral
8 positions, which may entail a wholesale dumping of the
9 collateral into the marketplace with the attendant erosion of
10 values. The deficiencies that counterparties may incur will
11 result in massive claims against the assets of the Lehman
12 estates. Ten to twelve thousand employees may not find any
13 employment. Any failure to consummate may potentially cause a
14 major shock to the financial system.

15 Although the potential sale of Lehman assets has
16 generally been known to the financial community for many months
17 and that the current transaction has gotten enormous and wide
18 media attention, as previously stated, only twenty very limited
19 inquiries were made from outside parties.

20 Again, he would testify, Your Honor, the universe of
21 potentially qualified and capable purchases is extremely
22 limited by the huge financial commitment that would have to be
23 made and the ability to access federal funds. At most, there
24 are less than a half dozen possible entities that might
25 qualify, and most of them have their own financial needs.

1 In conclusion, it is Mr. Ridings' opinion, he would
2 testify, that this sale transaction should be approved because
3 it serves the best interests of the creditors, the public and
4 the nation and that it was negotiated in good faith and at
5 arm's length by both parties.

6 That concludes the proffer, Your Honor.

7 THE COURT: Is there anyone who objects to my receipt
8 of the proffer in evidence or who wishes to examine Mr. Ridings
9 on cross-examination?

10 MR. QURESHI: Your Honor, again, Abid Qureshi, Akin
11 Gump Strauss Hauer & Feld, on behalf of the informal committee
12 of note holders -- the informal group of note holders. We
13 would like to cross-examine Mr. Ridings briefly.

14 THE COURT: All right, Mr. Ridings, would you please
15 come to the stand? Mr. Ridings, please, before sitting down,
16 just raise your right hand. I'm going to swear you as a
17 witness.

18 (Witness duly sworn)

19 THE COURT: Please be seated.

20 CROSS-EXAMINATION

21 BY MR. QURESHI:

22 Q. Good evening, Mr. Ridings. Sir, when was Lazard first
23 retained in connection with this engagement?

24 A. Lazard had been working with Lehman since July. We had an
25 engagement letter signed last Friday, before the filing, in

1 connection with the transactions that did not happen. And then
2 we were re-retained on, I guess, Monday afternoon, after the
3 filing.

4 Q. Okay. And, sir, is it correct that you are, again,
5 generally familiar with the terms and the provisions contained
6 in the asset purchase agreement?

7 A. Yes.

8 Q. And in your proffer the preservation of nine to ten
9 thousand jobs was discussed, correct?

10 A. Yes.

11 Q. And is it your understanding that Barclays' obligation,
12 under the terms of the asset purchase agreement, is to only
13 keep those employees for ninety days?

14 A. I think, under the terms of the agreement, all nine to ten
15 thousand people will be offered a job for ninety days, and at
16 the end of that period Barclays will decide if they want to
17 offer them full-time employment or not and, if not, they will
18 be given severance according to Lehman's normal severance
19 policy.

20 Q. Okay. With the severance to be paid by whom?

21 A. Barclays.

22 Q. Okay. So the obligation to employ runs only for ninety
23 days?

24 A. I don't know that there's a commitment only for ninety
25 days. It's unimaginable to me that they can run the business

1 without people.

2 Q. Sir, are you generally familiar with the closing
3 conditions contained in the APA?

4 A. Generally.

5 Q. Okay. And, according to your understanding, as you sit
6 here today, have all of the closing conditions been satisfied?

7 A. I don't know.

8 Q. Okay. Are you aware of any specific closing conditions
9 that have not been satisfied?

10 A. I don't know.

11 Q. Okay. Are you aware, sir, of the provision in the asset
12 purchase agreement that requires contracts to be negotiated
13 with eight key employees?

14 A. Yes.

15 Q. Is it your understanding that that is a closing condition?

16 A. Yes.

17 Q. Is it your understanding that that closing condition has
18 been satisfied?

19 A. I don't know.

20 Q. Okay. Is it your understanding that that closing
21 condition has been waived by Barclays?

22 A. Not that I know of.

23 Q. Okay. Sir, is it also your understanding that one of the
24 closing conditions is that, I believe, a prior version of the
25 APA used the term "substantial majority" of so-called "critical

1 employees" agreed to go with Barclays upon the closing of the
2 transaction?

3 A. My understanding: that it's that they don't leave. I
4 don't know that there's an agreement that they go.

5 Q. That they are acquired by Barclays, in other words?

6 A. In other words, they haven't left before the closing.

7 Q. Right. And is it your understanding --

8 MR. QURESHI: Or, strike that.

9 Q. Do you know if that closing condition has been complied
10 with?

11 A. We're closing tonight or we're not closing?

12 Q. Do you have an understanding of whether the substantial
13 majority of the employees on that list have agreed to stay upon
14 the closing?

15 A. That's not the -- they don't leave. It's not that they
16 agreed to stay. And at close of business I saw people working,
17 albeit not everybody was at their desk.

18 Q. Sir, in your proffer -- through your proffer you testified
19 that Lazard has contacted a number of entities in connection
20 with attempting to find buyers for these assets. Is that
21 correct?

22 A. Can you clarify when?

23 Q. Well, that is going to be my question. Since the
24 transaction with Barclays was signed up, has any effort been
25 made by Lazard to try to find an alternative buyer for the same

1 assets being acquired by Barclays?

2 A. Okay. There's a two-part answer: Number one, we
3 responded to inquiries coming in in the form of phone calls,
4 fax and letters. We spoke with all of those people. And as
5 mentioned in the proffer, not one of those people offered to
6 buy the assets that Barclays is buying. Those inquiries ranged
7 from someone who wanted to buy the phone system to people who
8 wanted usually to buy real estate.

9 In terms of reaching out to other parties, as Mr. Miller
10 suggested, there's a very limited number of people who would be
11 qualified. Almost every single one of those limited people
12 have either just completed an acquisition or are in the midst
13 of an acquisition or a merger.

14 It was my belief that it would not serve a purpose for me
15 or Lazard to reach out to those parties and say would you like
16 to bid for fear of throwing more panic on this offering.

17 Based on what's been reported in the papers, if those
18 people were interested they would have called.

19 Q. So am I to understand, sir, that your testimony is then
20 that Lazard, on behalf of the company, made no affirmative
21 effort to reach out to potential buyers for these assets but
22 responded only to inquiries that were received?

23 A. Based on what I said, yes.

24 Q. Okay. And, sir, in terms of the inquiries that were
25 received, were those people that inquired told that subsets of

1 the assets being acquired by Barclays were available? Or were
2 those people told that they would only be considered if they
3 wanted to buy everything?

4 A. The latter.

5 Q. Okay. And why is that, sir?

6 A. Because Barclays wasn't willing to close if they could --
7 people could cherry-pick assets.

8 Q. Okay. So do you know, for example, if any offers were
9 received through inquiries coming in to Lazard for the real
10 estate assets that exceed what Barclays is prepared to pay for
11 the real estate assets?

12 A. The real estate inquiries we got are for things that we
13 call CRE, commercial real estate, and they are not the assets
14 that are being sold to Barclays.

15 Q. So your testimony is that none of the inquiries that
16 Lazard received for any of the assets going to Barclays were
17 specific offers with respect to the same real estate being
18 acquired by Barclays?

19 A. Well, my understanding was that the inquiries for the real
20 estate were for the commercial real estate, not the securities
21 that Barclays is buying. Yes, that's my understanding.

22 Q. Sir, I'd like to ask you a question about the amendment to
23 the purchase agreement that we just received. If Mr. Miller
24 has a copy that I could hand up to the witness, that would
25 help.

1 MR. MILLER: Here.

2 MR. QURESHI: Thank you. May I approach, Your Honor?

3 THE COURT: You may.

4 Q. Mr. Ridings, first, were you involved in the negotiations
5 concerning this amendment?

6 A. Concerning the amendment, generally. The words on the
7 page, no.

8 Q. Okay. Let me direct your attention to paragraph 4.
9 That's the holdback and adjustment provision. And, again, my
10 apologies; I barely had time to read it. Can you please
11 explain, if you can, what your understanding is of that
12 provision and how it's to work?

13 A. I haven't read this either, so I can't explain it.

14 Q. So you were not involved in the negotiation of that
15 particular provision?

16 A. Not of that paragraph.

17 Q. Okay.

18 MR. QURESHI: Your Honor, may I have a brief moment?

19 THE COURT: Yes.

20 Q. Sir, is it your understanding that Barclays is now
21 demanding the holdback of 250 million dollars subject to
22 certain offsets?

23 A. I mean, the paragraph says what it says. And I can read
24 it for you, if you'd like.

25 Q. No, that's okay.

1 A. Okay.

2 Q. Sir, in your negotiations with Barclays, right, related to
3 this amendment, did they make the demand to you that they
4 wanted the holdback of 250 million dollars?

5 A. They did not make that demand to me, no.

6 Q. Okay. Are you aware of that demand having been made --

7 A. Yes.

8 Q. -- in the negotiations? Are you aware of Lehman having
9 agreed to it?

10 A. I believe they've agreed to this.

11 Q. Thank you.

12 MR. QURESHI: Nothing further.

13 THE COURT: Is there anyone else who wishes to cross-
14 examine Mr. Ridings?

15 Is there any redirect?

16 MR. MILLER: Just one question, Your Honor.

17 REDIRECT EXAMINATION

18 BY MR. MILLER:

19 Q. Mr. Ridings, you're aware of the additional amendments
20 that have been made to the asset purchase agreement which were
21 discussed earlier today?

22 A. Yes.

23 Q. And isn't it a fact that under those additional amendments
24 and clarifications that the 250 million dollars, to the
25 goodwill of LBI, is going to be paid to LBI?

1 A. That's my understanding. Yes, sir.

2 Q. So that that holdback provision has since been amended,
3 and in the clarified agreement there will be 250 million
4 dollars, if this transaction is consummated, that will go to
5 LBI?

6 A. Yes.

7 Q. Thank you.

8 THE COURT: Mr. Ridings, you're excused. Thank you.

9 THE WITNESS: Thank you.

10 MR. BIENENSTOCK: Your Honor, I have one
11 clarification on the record. We had submitted -- it doesn't
12 affect your BNC. We had submitted, I think as Your Honor might
13 have noted, two responses to the pending motion. When I cross-
14 examined, I only cross-examined on behalf of the Walt Disney
15 Company because, based on clarifications given to the Royal
16 Bank of Scotland, they are satisfied and withdraw their
17 response.

18 THE COURT: Thank you. Mr. Miller, do you have any
19 more witnesses?

20 MR. MILLER: No, Your Honor.

21 THE COURT: We're relieved. Does that conclude the
22 evidentiary portion of your case?

23 MR. MILLER: Concludes the debtors' case, Your Honor.
24 I assume my friend, Mr. Sabin, has to have the last word.

25 MR. SABIN: Not the last. I'm just asking whether,

1 on the record, we can include the debtors' affirmative case
2 with a clarification that was still left open, and that was as
3 to whether master ISDA agreements and master securities
4 contracts, other than those owned by Barclays, will not be sold
5 as part of this transaction.

6 UNIDENTIFIED SPEAKER: Right. They will not.

7 UNIDENTIFIED SPEAKER: Correct.

8 MR. SABIN: Thank you.

9 THE COURT: Okay. We've got clarification, which I
10 don't treat as part of the evidentiary record but rather as
11 stipulation of counsel or a response to counsel's question.

12 I'll repeat my question to Mr. Miller: Do you have
13 any other evidence that you wish to offer?

14 MR. MILLER: No, Your Honor.

15 THE COURT: Fine. Then the debtors' case, at least
16 evidentiary case, in support of the proposed relief is
17 concluded.

18 I'll simply ask if any of the objectors are intending
19 to submit any evidence of their own in opposition to the
20 pending motion.

21 Someone on the phone is rustling papers that we are
22 all hearing, and you are disturbing hundreds of people. Stop
23 it, please. And if there's anyone on the telephone who doesn't
24 have their mute button pushed to mute, do so now.

25 Mr. Golden, do you have something you want to say?

1 MR. GOLDEN: No, I was just going to say that we did
2 not intend to call a witness, Your Honor. We do not intend to
3 call a witness.

4 THE COURT: I assume because nobody spoke that that
5 was the -- but now we know, and I'm even happier to know that
6 you do not intend to call witnesses.

7 It seems to me that, at this point, then, this comes
8 down to either arguments in support of those objections that
9 have not been either withdrawn, as in the case of Mr.
10 Bienenstock's other client, or deferred, as in the case of any
11 disputes with respect to cure amounts.

12 And so I'm going to ask, so we can do this
13 expeditiously, who wishes to press argument? Unless Mr.
14 Miller, as proponent of the transaction, wishes to say anything
15 before he hears the objectors.

16 MR. MILLER: No, Your Honor. I think time is of the
17 essence right now. I would just like to say, Your Honor, that
18 because time is of the essence I've been informed by Ms.
19 Bambach of the SEC that the regulators strongly support this
20 transaction.

21 THE COURT: I will incorporate into the record of
22 this proceeding statements made by counsel for the various
23 regulators on Wednesday at the time of bid procedures being
24 approved in which I heard and considered the various statements
25 of counsel for the regulators in support of the transaction.

1 MR. MILLER: I would just add to that, Your Honor,
2 when Mr. Gallagher spoke he said he didn't really have
3 authority from the commission. But since that time, the SEC --
4 I mean, the commission has met, and he's been duly authorized
5 and has the same position, Your Honor.

6 THE COURT: That's good to hear. Thank you. Mr.
7 Despins?

8 MR. DESPINS: Your Honor, may I be heard very
9 briefly? And I apologize for this but we're moving really
10 quickly. And the first amendment -- Your Honor, we received
11 that about an hour ago, and there may be an issue here. And I
12 apologize but we just got it an hour ago. And, basically, this
13 is an amendment that protects DTC against potential claims that
14 may be made, and they're given collateral. I'm told that that
15 collateral could be as much as six billion dollars.

16 And that's fine, Your Honor. We're okay with that.
17 But the way this is drafted, they can keep this collateral
18 until all guaranteed obligations have been satisfied,
19 literally, one dollar left, they can keep six billion. I'm
20 exaggerating but that's the way -- I raised this with counsel
21 for DTC saying why don't we put in a provision in saying that
22 the Court, Your Honor, retains jurisdiction to make sure that
23 that situation does not present itself? And I don't believe
24 that they're agreeable to that. It puts us in a bizarre
25 position where -- we did not know about this provision. I

1 don't think it's intended that way but the way it's drafted
2 they can hold six billion if there's a hundred thousand dollars
3 of potential claims. We're not asking them to concede the
4 point. We're asking them to make that subject to Your Honor's
5 jurisdiction and further order.

6 THE COURT: Mr. Hirshon, do you want to comment with
7 respect to that? If you don't want to be here I can understand
8 why, but where do you want to be?

9 MR. HIRSHON: Right here, Your Honor.

10 THE COURT: Okay.

11 MR. HIRSHON: I'm having a good time. Your Honor,
12 let me explain the situation because it's not quite right, what
13 you've heard. It is true that the first amendment, as a
14 contractual term, between the purchaser and the seller calls
15 for an amendment under which instead of fifty percent of the
16 residential mortgages a hundred percent of the residential
17 mortgages are being sold to the purchaser. There is a separate
18 agreement between the purchaser and DTC under which those
19 mortgages are going to be used as collateral for the clearing
20 corporations. So the collateral arrangements are part of the
21 APA, and they're not subject to the APA and not subject,
22 practically, to Your Honor's control.

23 So in order to make that possible, the APA had to be
24 amended so that the other half of the residential mortgages are
25 now owned by -- will be owned by the purchaser and therefore

1 pledged.

2 However, in order -- the parties themselves then
3 said, well, we want to restore where we were before where you
4 had fifty percent and fifty percent. So the APA then has in
5 its amendment that, after the guaranteed obligations are
6 satisfied, if there is anything left over, and as I said
7 before, it's expected that there will be, then the purchaser
8 will return the fifty percent to the seller. And that's what
9 the APA says.

10 So it's in two pieces. The APA itself is simply a --
11 is amended simply to transfer the one-half that wasn't being
12 originally acquired to the purchaser. There's a separate
13 arrangement between DTC and the purchaser. And the APA then
14 says and when you're done settling, if there's anything left,
15 the purchaser has an obligation to return the fifty percent.

16 Now, this was --

17 THE COURT: May I understand something, and I
18 apologize if I'm intruding on your argument, just to clarify
19 something?

20 MR. HIRSHON: Please.

21 THE COURT: Who's the custodian of this? Isn't it
22 DTC?

23 MR. HIRSHON: It is. That's where all these reside.

24 THE COURT: So aren't we just talking about
25 accounting entries?

1 MR. HIRSHON: Yes, we are.

2 THE COURT: The mortgages aren't moving?

3 MR. HIRSHON: They are not.

4 THE COURT: And you hold these as a fiduciary for
5 whoever has an interest in them?

6 MR. HIRSHON: Exactly. Mr. Despins, doesn't that
7 cure the problem? Or what is the problem? It's not as if
8 there's any risk that the assets are going to move.

9 MR. DESPINS: No, no. I'm not concerned that they're
10 going to dissipate the assets; that's not the concern at all.
11 I'm telling you my experience with depository companies, not
12 this one, of course, but others, is that --

13 THE COURT: This sounds like a swipe at other
14 companies to me, but go ahead.

15 MR. DESPINS: Yeah, is that they are not incentivized
16 to release collateral. And, in fact, they will hold it four
17 years unless there's a clear way to force them to release the
18 collateral. We don't want the estate to be in a position where
19 we're waiting for two or three years to receive potentially six
20 billion dollars back, or a portion of six billion dollars back.
21 That's my only concern.

22 They should be protected. I want to be clear about
23 that. I am not saying they shouldn't be protected. I'm saying
24 that Your Honor should be able to intervene in case of -- in
25 the event that something is not returned because it is a

1 hundred thousand dollars of unsatisfied obligations. They're
2 holding three billion. If that's not the case, we won't be
3 here. We won't be here. But we --

4 THE COURT: Well, I --

5 MR. DESPINS: -- we don't want to be without
6 recourse. That's all.

7 THE COURT: -- I understand the point, although --
8 and I don't diminish the point by saying that it seems a highly
9 theoretical one to be pressing at this point in the hearing,
10 given that the estate's interest, whatever it may be, is, I'll
11 use the term, adequately protected, but I do understand this to
12 be an issue of whether or not DTC will, this evening, consent
13 to jurisdiction here for purposes of, in effect, being forced
14 to make an accounting entry for the benefit of the estate when
15 they are disproportionately oversecured by a gargantuan pool of
16 mortgages in respect of a de minimis claim.

17 My sense is that if they are in that position and are
18 resistant, that they would find themselves at the wrong end of
19 some litigation somewhere.

20 MR. DESPINS: That is correct, Your Honor.

21 THE COURT: And I don't know that this is a
22 particularly good time to force the issue, but I hear your
23 argument and I understand that you're looking to have DTC blink
24 on it. And I don't know if they're willing to do that this
25 evening.

1 MR. DESPINS: No, Your Honor.

2 THE COURT: Okay. So --

3 MR. DESPINS: But is it clear that Your Honor will
4 have -- will retain jurisdiction over that issue?

5 THE COURT: Well, it's not clear at all if we're
6 talking about nondebtors arguing about relative rights in
7 collateral posted to secured DTC's claims.

8 So I think that whatever I said tonight wouldn't
9 create jurisdiction, and I'm not prepared to reach that
10 question now. If the parties are willing to stipulate to
11 jurisdiction, I'm not even sure that solves the problem. There
12 either is or there isn't jurisdiction.

13 MR. DESPINS: And I'm not authorized to stipulate --

14 THE COURT: Fine.

15 MR. DESPINS: -- to jurisdiction.

16 THE COURT: So I think at this point the argument --
17 I understand the argument. We have a record on it. I trust
18 that DTC will not act in a commercially unreasonable manner and
19 that, whether or not this Court has jurisdiction, there are
20 clearly courts of competent jurisdiction in a position to
21 adjudicate future disputes.

22 MR. DESPINS: Thank you, Your Honor. And, Your
23 Honor, just to be clear, we would have raised this a long time
24 ago if we had seen the provision. We apologize but we just saw
25 it an hour ago. Thank you.

1 THE COURT: Okay. Now what?

2 MR. GOLDEN: Is it time for the objections, Your
3 Honor?

4 THE COURT: Yes.

5 MR. GOLDEN: Thank you. Daniel Golden, Akin Gump
6 Strauss Hauer & Feld, on behalf of an ad hoc group of LBHI
7 senior, sub and junior sub-bondholders, holding in excess of
8 nine billion dollars of such bonds.

9 Your Honor, as I walk to the lectern tonight, mindful
10 of Wednesday's hearings and tonight's proceedings, it reminds
11 me of a fable, one involving my namesake: Daniel walking into
12 the lion's den.

13 The bondholders recognize the seriousness of the
14 circumstances that brings the debtor and the CIPC trustee
15 before this Court. We recognize and they recognize, as
16 economic animals, and fully appreciate the extraordinary
17 circumstances that we all find ourselves in. And, yes, the ad
18 hoc bondholder group can hear and it can count and it can see
19 that the Federal Reserve Board, the Treasury, the various
20 commodity exchanges, the SEC, the Department of Justice and the
21 debtors all are desperate for this proposed transaction to be
22 approved.

23 And we've heard many motivations for that, but two of
24 them are what we've heard specifically: the need to stabilize
25 the financial markets and the preservation of up to 10,000 jobs

1 of Lehman employees. And those are all worthy goals, and my
2 clients recognize those goals.

3 But what we don't hear is at what cost and at whose
4 expense this transaction should be approved. What we don't
5 hear is why the Fed chose to bail out Bear Stearns and AIG and
6 just announced a potential rescue plan, like an RTC-type
7 bailout for all major financial institutions and yet somehow
8 Lehman Brothers gets left on the sidelines. We don't hear why
9 the Fed, despite choosing to ignore Lehman in connection with
10 the bailout, is, frankly, directing and mandating that this
11 sale to Barclays occur whether or not such sale is in the best
12 interests of creditors and maximizes value for creditors.

13 And, yet, the debtors and the CIPC trustee are asking
14 this Court to approve such sale, a sale whose terms, very
15 material terms, are still not resolved. And yet Mr. Miller
16 suggests that we should have a closing by 10:45 this evening.

17 And we've heard testimony, and I'll discuss that
18 further, that the marketing process with respect to these
19 assets, these assets which are the subject of this proposed
20 sale, was basically nonexistent. We don't believe that this is
21 a proper exercise of the debtors' fiduciary obligations.

22 Mr. Miller suggests when the committee initially
23 indicated its position of not either supporting or opposing the
24 transaction -- well, that's just a parochial interest of
25 creditors as if to diminish the interests of creditors, but if

1 the debtors aren't prepared to look out for the interests of
2 creditors, the creditors and the creditors' committee have no
3 choice but to do so for themselves.

4 Your Honor may recall at the conclusion of
5 Wednesday's hearing and at the urging of this Court and other
6 parties in attendance at the court, the debtors and their
7 professionals offered to hold a meeting -- or host a meeting at
8 Weil, Gotshal to answer questions about the transaction. And
9 certain important facts came out at that meeting, and they were
10 reiterated during the proffered testimony this evening.

11 For several months prior to the Chapter 11
12 proceedings, the debtors and their professionals engaged in a
13 substantial marketing process not to sell these assets but to
14 sell the entirety of the Lehman businesses. When these efforts
15 failed, Lehman sought financial and funding relief from the
16 government, which apparently was denied.

17 Days prior to the Chapter 11 proceeding, the Federal
18 Reserve took over those negotiations in an attempt to sell
19 Lehman's businesses as a whole, and only two potential
20 acquirers were identified: Bank of America and Barclays. And,
21 unfortunately, for reasons that are not altogether apparent,
22 neither of those institutions were prepared to go forward on a
23 sale for all of Lehman's businesses.

24 Left with no alternatives and left in a situation
25 where they were desperate for liquidity, the holding company

1 filed Chapter 11, and so we find ourselves here tonight.

2 Within two days of that Chapter 11 filing, the
3 debtors filed this approval motion seeking approval of the
4 proposed assets of certain businesses and certain assets of
5 Barclays belonging principally to LBI. And based upon the
6 facts and the testimonies adduced at this hearing, certain
7 things, we believe, are crystal clear. It is undisputed that
8 neither the debtors nor their advisers nor any governmental
9 agency involved attempted to specifically market the assets
10 which are the subject of the approval motion. In fact, when
11 the debtors originally entered into their agreement with
12 Barclays, they contracted away their rights to seek an
13 alternative buyer.

14 Now, I'm assuming, Your Honor, that it was the
15 determination of the debtors that that fact would not sit well
16 with the Court, that at Wednesday's hearing the Court was
17 advised that, through a negotiation between Barclays and the
18 debtors, that Barclays agreed to drop -- or allowed the debtor
19 to drop that no-shop provision.

20 But, in our opinion, it references a viewpoint, an
21 indication, a motivation that this transaction that the debtors
22 were trying to accomplish was not necessarily to get the most
23 value, the most appropriate value, to maximize value for
24 creditors, but it was to get this transaction done with
25 Barclays.

1 Since Wednesday, when the debtors were freed to go
2 out and shop these particular assets -- you've heard Mr.
3 Ridings testify that he took no affirmative steps to do so.

4 We believe this was a flawed sale process with
5 respect to these assets, a process that appears only to benefit
6 Barclays and the federal government but not the creditors of
7 this estate.

8 Perhaps as importantly, Your Honor, as I'm sure the
9 Court is aware, the economic landscape seems to have changed
10 over the last two days. Yesterday, the U.S. Treasury and the
11 Federal Reserve Board have begun discussions about a potential
12 bailout of financial institutions by the government agreeing to
13 buy distressed mortgages and distressed real estate assets of
14 these financial institutions. Just the hint of that potential
15 bailout has sent the equity of those financial institutions who
16 would be the beneficiary of that bailout soaring.

17 And, yet, the debtors and the Fed seem content or
18 determined that nothing get in the way of this transaction.
19 There is no attempt to determine, based upon the latest events,
20 whether Lehman can be a beneficiary of that potential bailout
21 or whether, in fact, as a result of that potential bailout, the
22 assets to be purchased under this transaction haven't increased
23 significantly in value.

24 And, yet, there has been no renegotiation of a sales
25 price. In fact, there has been a renegotiation of the sales

1 price. It's been a downward renegotiation, as Mr. Ridings
2 testified with respect to the real estate assets.

3 There is no final form of agreement to be approved by
4 this Court. We had a forty-minute session with counsel for the
5 debtors where they outlined to the parties in the courtroom
6 suggested changes. There's no writing. There's no opportunity
7 for parties-in-interest to review that. The first amendment,
8 frankly, was just handed out, and that's been around for a
9 couple of days, I'm told.

10 And, yet -- I'm sorry, since this morning?
11 Apparently they don't know how long it's been around.

12 THE COURT: Mr. Golden, given the pace of this
13 transaction, days merge for all of us and I don't think that's
14 a fair comment.

15 MR. GOLDEN: I'm sorry, Your Honor. You know,
16 everybody's frustrated: the parties, the debtors, the
17 governmental agencies, but so, too, are the creditors.

18 Going forward with this transaction this evening will
19 not allow anybody to assess whether this proposed bailout
20 legislation or any other restructuring alternatives,
21 restructuring alternatives that are very familiar to this
22 Court, such as a debt-for-equity swap of the 150 billion
23 dollars of securities at the holding company, could be a better
24 alternative for the creditors of the holding company.

25 There has simply been no credible evidence adduced at

1 this hearing that the price that Barclays is paying for these
2 assets represents fair value. The appraisals are not in
3 evidence. All you've heard is Mr. Miller discuss the contents
4 of the appraisals. There's no other testimony or evidence that
5 suggests the other assets being purchased by Barclays
6 represents fair value or an attempt to maximize value for
7 creditors.

8 I simply think, Your Honor, for whatever reason, the
9 debtor has failed to meet its burden with respect to the
10 appropriateness of the sale. We have heard the dire
11 consequences as to what will occur or may occur if this
12 transaction is not approved, but we have not heard credible,
13 cogent testimony as to whether the proposed purchase price
14 represents a fair value for these assets.

15 THE COURT: Mr. Golden, in effect, you're asking me
16 to weigh your speculation against their speculation. What
17 you're asking me to do is to weigh the fact that the markets
18 have turned because of the RTC-type announcement made last
19 night against the palpable, potential, devastating damage to
20 the markets to be caused if this transaction is not approved.
21 You've offered no affirmative evidence. Why should I give any
22 weight whatsoever to your argument?

23 MR. GOLDEN: Your Honor, I'm not asking you to allow
24 me to superimpose my business judgment versus the debtors'
25 business judgment. But it is not my burden, it is not the

1 burden of the ad hoc noteholders with respect to this
2 transaction, it is the debtors' burden. And they have not,
3 likewise, adduced any credible evidence as to what will happen
4 if this transaction is not approved this evening.

5 And, Your Honor, what we think, based upon the facts
6 and circumstances as we understand them, that this situation --

7 THE COURT: You weren't listening to Mr. Ridings'
8 proffer, apparently. Because in unrebutted testimony he
9 indicated through the proffer that the markets, in effect,
10 would tank. Your cross-examination didn't even touch that
11 subject.

12 MR. GOLDEN: Your Honor, you're right. We did not
13 cross-examine that. Frankly, I don't believe that Mr. Ridings
14 could credibly testify as to what would happen if these -- if
15 this particular transaction was not consummated this evening.

16 We think, Your Honor, that what this situation cries
17 out for is a denial without prejudice, but really a brief
18 delay. Not a delay for weeks or months, but a delay so as to
19 determine once and for all, has, in fact, every viable
20 alternative been considered in order to maximize the value for
21 assets.

22 I said to the Court on Wednesday -- as we sat here on
23 Wednesday and as I sit here this evening, we don't know whether
24 this transaction represents the best viable option for these
25 assets. And we can't know this because we believe there was an

1 inappropriate and flawed marketing process with respect to
2 these assets.

3 A brief delay would have several beneficial effects
4 in our view. We'd allow the parties to finally negotiate a
5 final asset purchase agreement --

6 MR. MILLER: Excuse me, Your Honor. Is Mr. Golden
7 testifying?

8 THE COURT: I think what Mr. Golden is doing is
9 converting his argument into what amounts to a request that I
10 not approve the transaction this evening so that more time can
11 be spent to evaluate transactional alternatives, or
12 alternatively, to evaluate whether or not this transaction, as
13 it has evolved at the last minute, may, in fact, be the best
14 transaction. That's my interpretation. I don't consider this
15 to be testimony, I consider it to be an argument.

16 MR. GOLDEN: Thank you, Your Honor.

17 THE COURT: Have I understood your argument?

18 MR. GOLDEN: You have, perfectly.

19 THE COURT: Thank you.

20 MR. GOLDEN: If we were to have a brief delay, Your
21 Honor, as I said, there would be several benefits that could be
22 achieved. A final form of agreement could be finally agreed to
23 and produced and put into evidence. What's been put into
24 evidence to date is an agreement that's not final with material
25 terms left to be negotiated. So, frankly, I don't know exactly

1 what the debtors are asking this Court to approve this evening.

2 We can determine once and for all, is there anybody
3 else prepared to pay more consideration either in dollars or
4 assumption of liabilities with respect to these assets. We can
5 determine whether the federal government is prepared to allow
6 Lehman to be a beneficiary of any proposed bailout legislation.

7 As I said, Your Honor, it's almost, in our view,
8 impossible for the debtors to have carried a burden with
9 respect to a contract that's not complete.

10 THE COURT: I'm sorry, Mr. Golden, it's my
11 determination as to whether they've carried the burden. And
12 you're not in the position to say it's almost impossible. So I
13 know it's argument, but don't go there.

14 MR. GOLDEN: Okay, Your Honor. It's our view that
15 they haven't sustained that burden. I fully well appreciate
16 that that ultimate decision is made by the Court.

17 Your Honor, it's not a secret here that the
18 bondholders are frustrated by the process. They're frustrated
19 with the lack of clarity with respect to the agreement.
20 They're frustrated by the fact that it changes every few hours.
21 They understand it but they're frustrated by that fact.
22 They're frustrated that they're asking to weigh in on a
23 contract that's not final.

24 And what the bondholders can't really tolerate is
25 that to the extent that this transaction is approved, the

1 debtors may believe that they have free license to treat the
2 balance of the assets of this estate in the same cavalier
3 manner. It's not that the bondholders don't understand the
4 pressures, the crushing economic time pressures that the
5 debtors were operating under. But nobody ever reached out to
6 the major creditor constituents. Nobody ever suggested maybe
7 there's an alternative here that is something less than selling
8 assets on what we perceive to be a discount value.

9 Your Honor, you said on Wednesday that the
10 transaction would be considered up or down this evening. It
11 leaves the bondholders very little choice. They don't like the
12 transaction in its current form, so the natural inclination is
13 to say, as our written objection was styled, that they object
14 to the approval of the transaction. But what the bondholders
15 are really seeking is an opportunity, a very brief opportunity,
16 to vet this process and to ensure that all the alternatives
17 were actually considered, to find out whether there were other
18 possibilities. We have more faith in the Federal Reserve and
19 the Treasury. We don't believe, this is my view, that should
20 this transaction not be approved that the parade of horrors
21 will not fall down on these assets.

22 So short of asking for an adjournment, which I know
23 that Your Honor was not disposed to consider when we considered
24 the DIP proceeding --

25 THE COURT: It wasn't that I wasn't disposed to

1 consider it, I denied it.

2 MR. GOLDEN: We think the appropriate course of
3 action, Your Honor, is to issue a denial of the motion without
4 prejudice so as to allow the process to unfold in a way that's
5 a little bit more transparent, a little bit more conducive to
6 allow parties -- all parties-in-interest to understand once and
7 for all whether this represents the highest and best value with
8 respect to these transactions. Thank you.

9 THE COURT: Thank you, Mr. Golden.

10 MR. NOVIKOFF: Good evening, Your Honor. Howard
11 Novikoff, Wachtell, Lipton, Rosen & Katz on behalf of JPMorgan
12 Chase Bank N.A.

13 Your Honor, we are not here to urge the Court not to
14 act tonight. We think Your Honor should act tonight. And we
15 appreciate the speed with which the parties have been moving.

16 We are here and we filed a limited objection because
17 we are concerned that there's a lack of clarity in at least two
18 significant respects and the way that the order affects
19 JPMorgan. And there is one matter not requiring relief of the
20 Court but a matter we do want to bring to the Court's
21 attention.

22 First, as Your Honor may recall from argument on
23 Tuesday, JPMorgan is Lehman's major clearing bank. In that
24 role, it maintains literally hundreds of clearing, operating,
25 settlement and other accounts. And in that role it makes

1 advances against securities collateral on a daily basis.

2 As of this morning, the amount of the advances, Your
3 Honor, was approximately 23.2 billion dollars. Against which,
4 JPMorgan is holding collateral.

5 In addition, Your Honor, JPMorgan is a major
6 counterparty with Lehman and various types of what we refer to
7 as Safe Harbor transactions, such as security lending
8 arrangements, repurchase agreements, ex-contracts and other
9 similar agreements. And with respect to many of those it also
10 holds collateral and holds setoff rights. And, as Your Honor
11 heard in detail on Tuesday, we have a guarantee from LBHI,
12 which is secured by collateral, which LBHI values at
13 approximately 17.9 billion dollars.

14 We have heard that as part of the purchased assets,
15 the debtor -- excuse me, Barclays is seeking to purchase 47.4
16 billion of securities. While we've been given that as a
17 number, we don't know, there's simply a lack of clarity as to
18 whether any of those securities are securities that are held by
19 JPMorgan as collateral as I just described.

20 A difficulty with the order, Your Honor, if that was
21 the intent, is it does not provide for any payment to JPMorgan
22 for that collateral. And in view of the fact I described
23 collateral -- collateral securing obligations of over forty
24 billion dollars, saying we would have access to a pool of 1.7
25 billion, along with everybody else chasing that pool, would not

1 be very satisfactory.

2 I have sought clarification and I believe obtained
3 clarification from Barclays. That, in fact, they are not
4 seeking or are not treating as purchased assets any of those --
5 any of the collateral that JPMorgan is holding for that. And I
6 would like that stated on the record, otherwise we need to
7 correct the order.

8 THE COURT: You're going to have to move to a
9 microphone, and state your name.

10 MS. GRANFIELD: Good evening. Lindsee Granfield from
11 Cleary, Gottlieb, Steen & Hamilton LLP for Barclays Capital.

12 It's our understanding that with respect to the
13 purchase assets in this transaction that they do not include
14 the assets that JPMorgan is holding as its collateral.

15 THE COURT: Is that satisfactory?

16 MR. NOVIKOFF: I believe she stated it's Cleary
17 Gottlieb's understanding. I'd like to know if that is after
18 consultation with the client.

19 MS. GRANFIELD: That is.

20 MR. NOVIKOFF: The second, as I mentioned, Your
21 Honor, that JPMorgan is a major counterparty in various Safe
22 Harbor contracts. The proposed order contains an injunctive
23 provision which affects the debtors' rights in property of the
24 estate. It involves an ability on the part of Barclays to
25 choose contracts in the future for assignment and assumption.

1 And in the latest version it contains an incomplete protection
2 for Safe Harbor contracts. I would just like a clarification
3 to the effect that -- and I suspect there may be other parties
4 looking for this, that nothing in the proposed sale order
5 affects any right of JPMorgan under or with respect to any
6 securities contract, commodities contract, forward contract,
7 repurchase agreement, swap agreement or master netting
8 agreement, and I use each of those terms as defined in the
9 Bankruptcy Code, Your Honor, to exercise any contractual right.
10 And I use that term as well. Contractual right is defined in
11 the relevant sections of the Bankruptcy Code. Of a kind
12 described in Sections 362(b)(6), (7), (17) or (27), 362(o) and
13 Sections 555, 556, 559, 560, or 561 of the Bankruptcy Code.
14 I've intentionally done it, Your Honor, in that way by making
15 direct reference to the Bankruptcy Code terms. And we were
16 looking just for a clarification and understanding. But that
17 is the effect of the order so as not to affect the Safe Harbor
18 contracts.

19 THE COURT: We need a clarification, confirmation?

20 MR. NOVIKOFF: I need confirmation. And that one, I
21 believe I need from both, the debtor and Barclays, Your Honor.

22 MR. MILLER: Debtor has no objections.

23 MR. NOVIKOFF: Okay. Now --

24 THE COURT: Do we have it, I don't think so.

25 MR. NOVIKOFF: And just to be clear I'm looking for

1 that as it relates to the proposed sale order. There was an
2 order entered today commencing the SIPC liquidation which had
3 limited effects, and I'm not challenging that. I'm just
4 talking in terms of anything added by the proposed sale order.
5 That does not deal with secured party rights, secured netting
6 rights.

7 MS. GRANFIELD: Mr. Novikoff had pointed out that the
8 section that had been added to the sale order went through a
9 lot of the Safe Harbor terms. That may be just a mistake,
10 didn't add in every single section of the code that people
11 usually colloquially refer to as the Safe Harbors. So with
12 respect to those few things that weren't added to the order, we
13 recognize that the Safe Harbors exist. And we understand that
14 we are not purchasing the things that are either his collateral
15 or that we can stop the Safe Harbors from being affected.

16 THE COURT: Let me clarify what you just said because
17 we're talking about the form of order and the impact of the
18 order, if any, on what we were globally talking about the
19 universe at Safe Harbor provisions, as those terms are
20 generally understood in the Bankruptcy Code to deal with repo
21 swaps, forward contracts, securities contracts and the like.
22 And by making the statement that I just made, I am not
23 intending to leave anything out.

24 I simply want to confirm, as Mr. Novikoff has sought
25 to confirm, that it is intended that those provisions, to the

1 extent applicable outside of bankruptcy are, in fact, all
2 governing. And that nothing in the sale order is intended to
3 impair, in any respect, those contractual rights.

4 MS. GRANFIELD: Yes, Your Honor.

5 THE COURT: Thank you.

6 MR. NOVIKOFF: Thank you, Your Honor. And then the
7 one point I needed to inform Your Honor concerning -- as I've
8 mentioned, JPMorgan maintains literally hundreds of accounts
9 for Lehman Brothers Inc. And they continue, through the day
10 today, to continue operating those accounts. During the course
11 of the day, it was either Lehman Brothers or the SIPC trustee
12 that, during the course of the day, was the owner of those
13 accounts.

14 At this point, we are not sure whether Barclays
15 intends to use those accounts on Monday or not. We believe
16 that they will, in fact, need to use those accounts in order to
17 continue their operations. There will be a complication in
18 that when securities and cash hit those accounts on Monday, we
19 are not going to know, unless somebody tells us, whether those
20 securities and cash belong either to Barclays or to the SIPC
21 trustee; that is, are they attributable to assets that have
22 been purchased by Barclay or they have not.

23 So between now and then we are perfectly willing to
24 work with the SIPC trustee and Barclays to create a protocol so
25 that we can get instructions in how to deal with that, but we

1 have to get that resolved or we will not be in a position to
2 operate those accounts. Also, Your Honor heard that DTC, the
3 clearing organization, insisted and negotiated heavily during
4 the day and received potentially billions of dollars of
5 collateral to protect it against the possibility of liability,
6 overdrafts, etcetera, with respect to its clearing operations.

7 In the ordinary course, JPMorgan also picks up those
8 type of obligations. Indeed, last night, picked up -- they had
9 to make a fail advance to allow clearing to go forward of over
10 seven billion dollars. If our accounts are going to be used to
11 effect a smooth transition until Barclays has its accounts set
12 up with another institution, we're going to have to work with
13 them and with SIPC to make sure that -- whether it's a
14 guarantee, an indemnity, or some other procedures are put in
15 place so that JPMorgan is not at risk for providing that
16 transition. Again, we are willing to work with them over the
17 weekend to make sure that works. If, in fact, they have other
18 accounts that they can use on Monday other than ours, we're
19 delighted to do that. But we did want Your Honor to know that
20 that's something that has to be resolved from our perspective,
21 and it is not resolved yet.

22 THE COURT: Thank you for that. And let me clarify
23 that the statements you've just made with regard to transition
24 issues that are quite significant from the perspective of
25 JPMorgan Chase are not issues that affect the Court, but they

1 are rather closing issues that must be addressed in order to
2 effect an orderly transition. Correct?

3 MR. NOVIKOFF: That's correct, Your Honor. We are
4 not seeking relief from the Court on those issues, but if we
5 fail to reach agreement I did not want JPMorgan's credibility,
6 or, frankly, my firm's credibility, to be affected because we
7 didn't let you know that those issues existed.

8 THE COURT: Thank you.

9 MR. NOVIKOFF: Thank you.

10 THE COURT: Mr. Sabin?

11 MR. SABIN: Your Honor, I know the hour is late.

12 I'll be very brief. There is but one issue remaining, I
13 believe, that is not yet resolved and it arises in connection
14 with that part of this transcript, if you will, when it becomes
15 a transcript, that otherwise was raised in ours, and that is
16 related to the small amount, allegedly, of IP assets that do
17 not belong to any of the debtors that we do not believe this
18 Court has jurisdiction to sell free and clear. So assuming we
19 can solve it by drafting in the order, and assuming that's
20 acceptable to the debtors and purchaser, hopefully we could
21 schedule those assets, we could define them in the appropriate
22 places, carve them out from the relief otherwise with respect
23 to the balance of the purchase assets, which are assets of the
24 debtors. If that can be done then the entirety of our concerns
25 and our limited objection of the Harbinger funds would be

1 resolved.

2 THE COURT: All right. I hear that argument, and I
3 don't know if anybody on the debtors' side, as a matter of law
4 or as a matter of structure, would argue that notwithstanding
5 what Mr. Sabin has said it may be possible for those IP assets
6 to be transferred free and clear. I'll be the first to admit
7 that I don't know, based on this record, anything about where
8 the IP resides. And my best recollection of the statements
9 made by Lori Fife is that she wasn't so sure where, within the
10 corporate structure, those assets reside. So based on the
11 record, I think it would be hard to override Mr. Sabin's
12 concern, but I'm not eliminating the possibility that the
13 debtor could make such an argument, and it sounds like it's a
14 drafting issue.

15 MS. GRANFIELD: Your Honor, it's not a drafting
16 issue, quite.

17 THE COURT: You're going to have to talk by a
18 microphone.

19 MS. GRANFIELD: I'm sorry.

20 THE COURT: Then you're going to have to make an
21 argument --

22 MS. GRANFIELD: No, I understand, Your Honor.

23 THE COURT: -- as to how, as a matter of bankruptcy
24 law, assets that are not residing within this debtor or its
25 property-owning affiliate can be the subject of a free and

1 clear order.

2 MS. GRANFIELD: No, I understand. I understand the
3 argument and Your Honor's view. Obviously, a few things in
4 terms of our ability to schedule those assets -- it may be
5 drafting and you're right. We can see on a recess or as we're
6 trying to do an order, whether we can come to agreement or not.
7 But to say that we don't want to be put into a position of the
8 proverbial death by a thousand cuts, where Barclays --

9 THE COURT: I think I'm in that position right now.

10 MS. GRANFIELD: -- you know, where Barclays obviously
11 has made a tremendous effort in trying to get to a position to
12 be able to close this transaction, so we'll see, Your Honor.
13 But I just wanted to not be too quick, and I understand the
14 legal argument and Your Honor's view -- but too quick that it's
15 just a drafting --

16 THE COURT: If you want to think about an argument
17 that would permit this Court to convey nondebtor property free
18 and clear, I'm certainly receptive to creativity. But I think
19 that at this hour, it may really be a drafting issue or an
20 issue of risk assessment.

21 MS. GRANFIELD: No, I think it's the latter. So we'd
22 have to -- it's really just having the ability to talk to the
23 client. And we'll have to make a decision in terms of,
24 obviously, the deal was we're buying the assets free and clear.
25 But we'll leave that to the recess.

1 THE COURT: Well, I think it was Mr. Miller who
2 mentioned that 10:45 was a witching hour. And I haven't heard
3 all the objectors. So absent a miracle, I think it's going to
4 be hard to make that deadline.

5 MR. MILLER: I didn't understand that PWC was
6 objecting, Your Honor. I thought we went through that earlier
7 today.

8 MR. FLICS: Your Honor, Martin Flics of Linklaters
9 for the administrators. Just as Mr. Novikoff and some others
10 have had some important clarifying points, we do as well. And,
11 in fact, the first point may relate to the very last point that
12 was just addressed. These businesses have, for many years,
13 operated as one. And what is being proposed tonight is
14 something very ambitious. And as we've indicated, we do not
15 oppose it. But it is very ambitious. It is the complete
16 separation of these businesses that have operated as one.

17 The asset purchase documents, as we have pointed out
18 in our response and in the declaration, do not do a perfect job
19 of effecting that separation. There are a number of issues
20 that need to be addressed. Those issues are important not only
21 to the European entities, but as we've heard in the last round
22 of discussion, they're probably important to the debtors as
23 well, in effecting the sale. For example, there is
24 intellectual property and IT all over the enterprise that is
25 shared. Some of that intellectual property is owned by

1 European entities and is used by the American entities.

2 That intellectual property surely cannot be
3 transferred tonight. Those entities and administration surely
4 cannot have their property compelled to be transferred. I
5 assume no one would dispute that. On the other hand, equally,
6 there are assets owned by the U.S. entities that are used in
7 the European business. There are client contracts that are
8 shared. There are source codes that are shared. There are
9 issues of confidentiality and access to source code. There's
10 various ownership rights in the IT and in the process.

11 There are a lot of issues that are very important to
12 both sides. These issues have not yet been addressed. And
13 they need to be addressed. During the course of the last
14 couple of days, we have communicated a number of the points to
15 Weil Gotshal and to the debtor. We have made our points in our
16 responsive pleading. We understand that some of them may have
17 been addressed in the proposed amendment, but we don't know.
18 We understand that others have not, but we don't know which
19 have been and which have not been.

20 We are prepared to accept a representation and
21 confirmation that all of the issues that we have set forth in
22 our response and in our declaration will be negotiated in good
23 faith, expeditiously. As I said, they're very important to the
24 administrators, and we think they're also important to the
25 estate. There are issues of our access to books and records

1 that we think we have a reasonable right, not to mention a
2 statutory obligation, to review, and all of the proprietary
3 information that is shared across the IT and intellectual
4 platforms. So as to the first of the two issues that I wanted
5 to address this evening, I would like to know -- we're not
6 going to negotiate those standing here, for sure.

7 THE COURT: Certainly not in my presence.

8 MR. FLICS: And I'm certainly not capable of doing
9 so. But we have had representations informally from people in
10 the course of this evening that they are prepared to do so. We
11 will accept that representation as a means of going forward
12 with the --

13 THE COURT: Are you also reserving rights in respect
14 to that representation?

15 MR. FLICS: -- we are absolutely reserving rights in
16 the event that we are not able to achieve a satisfactory
17 resolution on the issues that we have put of record.

18 THE COURT: Do I understand that your principal
19 concern relates to the very same intellectual property rights
20 that we were talking about moments ago, or is it different?

21 MR. FLICS: Actually, I have no idea. All I know is
22 that they have mentioned cryptically intellectual property of
23 nondebtor, and there is some issue about its ability to be
24 transferred. That happens to be an issue because I know that
25 the European entities hold some intellectual property that is

1 used by the American entities. I have no idea if that's the
2 particular point they were raising. Perhaps it's some other
3 nondebtor entity. I can only speak to the administrators and
4 their estates. I would like to get that confirmation on the
5 record so that we could proceed.

6 MR. MILLER: We'll negotiate in good faith.

7 MR. FLICS: Okay. And we reserve our rights in the
8 event that we cannot reach a satisfactory resolution. The
9 second issue is an issue that you have heard something about
10 this evening and in the course of the press, which is the so-
11 called eight billion dollars that is owed to Lehman Brothers
12 International Europe. I will not spend more than a minute on
13 the substance of that issue.

14 For parties that care to understand what the
15 administrators' current state of knowledge is on that, they can
16 refer to our pleadings. As I said, we have a declaration of
17 one of the administrators which describes their understanding
18 of the state of affairs at this time. I think I should
19 emphasize what should be obvious to all, which is that it is a
20 point of substantial interest and concern to the
21 administrators. This is not the only forum in which people
22 have been working day and night. In fact, the administrators
23 were strangers to Lehman Brothers until Monday morning and they
24 have, in the course of just the last few days with a team of
25 literally hundreds of people, tried to understand this business

1 in the very course of the business being split and to fulfill
2 their obligations as administrators.

3 One of those obligations is clearly to determine
4 their rights in respect of these claims. We want to be certain
5 that the entry of this order in no way prejudices the rights of
6 the administrators to pursue their rights and claims against
7 the debtors or third parties. We recognize, before people jump
8 up, that it does limit our rights against the purchaser. But
9 as to everyone else in the world, it should not be impairing
10 our rights in any way to seek and pursue our rights and claims
11 against those parties.

12 I did note earlier in the evening, a matter that
13 makes the issue easier for us with respect to the purchaser,
14 and I know that this is good news/bad news, which is that no
15 cash was being transferred to the purchaser. To the extent
16 that there were substantial amounts, that might have raised
17 some issue as to what the source of it was. But since there is
18 not, that is probably not an issue for the purchaser. But we
19 just want to be very clear that if anyone believes that in the
20 course of this sale, this sale order, that somehow there's an
21 intention to limit our ability to pursue, investigate and
22 assert these claims, I'd ask them to say so, because I do not
23 believe that they do.

24 THE COURT: You seem to be asking for somebody to
25 speak up. It's almost like a wedding.

1 MR. MILLER: Well, I guess sales are like weddings.

2 MR. MILLER: If there's somebody that represents the
3 rest of the world, Your Honor, I wish he would speak up.

4 MR. FLICS: Okay. Well, hearing nothing --

5 THE COURT: I hear no one disagreeing with your
6 assertion, and I trust that the order is not intended to cut
7 off rights against any parties other than Barclays.

8 MR. FLICS: Thank you, Your Honor.

9 MR. BIENENSTOCK: Good evening, Your Honor. Martin
10 Bienenstock, Dewey LeBoeuf, for the Walt Disney Company. Due
11 to the hour, etcetera, I can say that the issues I'm about to
12 address briefly boil down to two provisions in this order,
13 which can be dealt with either by -- if the Court cares to
14 interpret them in a way that I'll submit makes them legal or by
15 interlineation.

16 The premise of the remarks is basically that even
17 when parties get together to do God's work and do God's work,
18 when it's human beings doing it, they may also do some other
19 things that are illegal. And it's not at all surprising, based
20 on Mr. McDade's testimony, that when he sat at the table he was
21 sitting there as the representative of LBHI and LBI. It's not
22 at all surprising that the interests of subsidiaries of those
23 and those creditors of those subsidiaries were not represented.
24 And as we all know, in a commercial sense, the easiest thing to
25 do when two parties are negotiating what seems like a zero-sum

1 game, is to say the third party will pay extra money or incur
2 extra liability. And that's what we think has happened here.

3 And Your Honor, I hope, will note I'm not asking for
4 the Court to agree to some argument of exercising discretion in
5 one way or another. I'm only bringing to the Court's attention
6 that which I think the Court is compelled to do based on
7 whether something is legal or illegal. And we just have to
8 rely on the Court that even when parties are doing God's work,
9 the law is the law and it needs to be carried out. So what am
10 I referring to specifically?

11 You can tell that none of the subsidiaries or their
12 creditors were represented here by the very fact that the
13 entire purchase price is payable to the three entities, the
14 LBI, LBHI and the LB 745 LLC. We have testimony, as Mr. McDade
15 admitted on cross, that that long list of businesses,
16 everything in North America, foreign exchange, etcetera, is
17 being transferred. The asset purchase agreement says it's
18 being transferred. Those are the businesses that the
19 subsidiaries conduct. What the asset purchase agreement does,
20 in our view, and Your Honor doesn't have to decide this, is sub
21 silentio. It transfers the business of the subsidiaries: the
22 foreign exchange business, the Walt Disney Company, trades with
23 and Lehman Brothers Commercial Corp. But it doesn't get part
24 of the purchase price here.

25 Its employees are leaving, the infrastructure is

1 leaving. Everything important is leaving. He admitted it is
2 being wound down. It'll have to be. No one's left to really
3 run it for a profit. But they don't get part of the purchase
4 price. Now this, frankly, I don't think should even be
5 objectionable to the debtors or doesn't affect Barclays. I
6 don't know how the committee will come out. But if paragraph 4
7 on page 12 of the proposed order, which is the free and clear
8 paragraph --

9 THE COURT: Well, you know, the only person in this
10 room who seems not to have the proposed order is me, Harvey.

11 MR. BIENENSTOCK: The judge needs an order.

12 THE COURT: Where are we looking?

13 MR. BIENENSTOCK: Paragraph 12 -- I'm sorry,
14 paragraph 4 on page 12, carrying on to page 13. It's a
15 somewhat boilerplate provision providing that interest, which
16 is broadly defined to include claims interest and a thousand
17 other things in the assets transferred, will attach to the
18 proceeds. Now, what's happening here is in the asset purchase
19 agreement they're transferring the employees, the
20 infrastructure, ultimately the business of the subsidiaries,
21 without having the subsidiaries a party, simply by virtue of
22 the fact that technically the employees work for LBI or LBHI,
23 etcetera.

24 To give the subsidiaries a fair shake here, all
25 really that needs to happen is the Court can say the

1 subsidiaries can submit their claims to their share of the sale
2 proceeds to the extent they show that they had value, they in
3 essence were being sold, and they'll get whatever the Court
4 determines they're supposed to get when it allocates a purchase
5 price someday. And since the estate has billions of dollars of
6 real estate, it will be selling later, which we'll part see at
7 this purchase price, it shouldn't be hard to accommodate that.
8 That's one thing. It's both required -- otherwise, you have
9 subsidiaries losing all value with no compensation, and it also
10 shows the mental -- the dynamics at work, which as I said
11 before was two parties get together; the easiest thing to make
12 a deal is to take from a third party. The other provision --

13 THE COURT: It may be that they're not being --
14 nobody's taking any -- it might be that it's not taking as much
15 as collateral damage; that the consequence of selling the
16 platform is to indirectly erode value within the subsidiaries
17 that you're talking about. You have the advantage of perhaps
18 having some understanding of the corporate structure of Lehman.
19 There is nothing that has been presented to me since Monday of
20 this week, when I first became actively acquainted with this
21 case, that has instructed me on a corporate structure of the
22 various entities that you are referencing. I know about LBHI.
23 I know about LBI. I now know about the European entity. And
24 this is a learning process for probably all of us. And it's
25 happening in a hurry.

1 If what we're talking about is crafting consensual
2 language that's acceptable to the debtor and also acceptable to
3 the purchaser, that modifies the free and clear paragraph to
4 give you what amounts to a reserved right to make a claim on
5 behalf of your client -- I don't know how you do that,
6 actually -- to an allocated portion of an unallocated purchase
7 price. I think it may be an invitation to future disaster.
8 But that's just me, late in the evening, processing what you
9 said.

10 MR. BIENENSTOCK: No, Your Honor, I might have been
11 misunderstood because I submit it's simpler than that. This
12 paragraph 4 already allows everyone with any type of interest
13 in the proceeds to -- it automatically attaches the interest in
14 the assets to the sale proceeds. All I'm saying is the Court
15 can solve this problem by saying the subsidiaries can assert
16 their interest in this -- that this paragraph, as drafted, will
17 also allow the subsidiaries to assert whatever interest they
18 have. If Your Honor's theory is right, they may have zero
19 interest. But they can assert their interest --

20 THE COURT: It wasn't a theory. It was just a
21 musing.

22 MR. BIENENSTOCK: Pardon me?

23 THE COURT: I was just thinking about the
24 consequences of what you said in light of what was in the
25 order. And I may have unduly complicated it. But I think the

1 only thing, then, that's being requested by Mr. Bienenstock as
2 to this paragraph is that the debtor agree, if willing to do
3 so, that certain unnamed subsidiaries -- or maybe we need to
4 name them -- will have at least the ability to assert an
5 interest in proceeds, whatever that might be.

6 MR. BIENENSTOCK: That's right.

7 THE COURT: Mr. Miller?

8 MR. MILLER: As I understand Mr. Bienenstock, Your
9 Honor, all he wants to do is have a right to file a claim
10 against the proceeds. Is that correct?

11 MR. BIENENSTOCK: Well, for the subsidiaries to have
12 the right -- it's their proceeds.

13 MR. MILLER: Without conceding that there's any claim
14 whatsoever, or that his theory on businesses being sold has any
15 validity whatsoever, I don't see that there's any restriction
16 in this order against anybody filing a claim against those
17 proceeds.

18 THE COURT: Is that a yes or a no, Mr. Miller?

19 MR. MILLER: That's a yes, Your Honor.

20 THE COURT: Okay.

21 MR. MILLER: But it doesn't affect the purchaser,
22 Your Honor. It's just the proceeds of the sale. And the
23 subsidiaries he's talking about, Your Honor, are subsidiaries
24 of LBI. And, therefore, he's really talking about the
25 allocated 250 million dollars that goes to LBI, which is in a

1 SIPC proceeding.

2 MR. BIENENSTOCK: Your Honor, the answer was yes, and
3 I can move on.

4 THE COURT: I'm glad I asked that question.

5 MR. MILLER: I just hope that Mr. Bienenstock and his
6 client understand that.

7 MR. BIENENSTOCK: Your Honor, the other provision
8 which is -- well, at least as important, if not more so, is in
9 paragraph 10 on page 15 of the proposed order. There's
10 language about free and clear and successor liability all
11 through this order. Except in paragraph 10, the language is
12 fairly good at saying that -- at protecting Barclays from
13 successor liability for any claims against the debtors, which
14 is conventional, and that's what we're all accustomed to. Now,
15 whether you can have a free and clear order that applies to
16 successor liability is an issue in itself. Only one or two
17 circuits have spoken on it. But that's not for tonight.

18 But generally, in the order, the successor liability
19 is spoken about as successor liability for claims against the
20 debtors. In this paragraph, in paragraph 10 -- page 15,
21 paragraph 10, section C -- the order, or the proposed order,
22 provides that the purchaser and its affiliates, etcetera, shall
23 not have successor liability as a continuation of substantial
24 continuation of the debtors -- fair enough -- or any enterprise
25 of the debtors. If that is interpreted to mean divisions of

1 the debtors but not subsidiaries, I don't have a problem. And
2 then my client would not be enjoined pursuant to the paragraph
3 on -- there is a paragraph in here enjoining parties against
4 bringing claims that you're not supposed to bring or that are
5 sold free and clear.

6 But if "or any enterprise of the debtors" is
7 interpreted as subsidiaries of the debtors, then we run into
8 the issue that Your Honor started to discuss earlier. What is
9 the authority for a creditor of a nondebtor to be told that its
10 business was transferred free and clear of liens, claims,
11 interest, successor liability? Now, if Mr. Miller is right, or
12 his suggestion turns out to be true of a possibility that the
13 businesses of the subsidiaries were not transferred, fine, then
14 presumably the action may not be meritorious unless there's
15 another good theory. And there are other theories besides
16 successor liability.

17 But, again, we're not asking Your Honor, and it's not
18 before Your Honor tonight to decide whether creditors of the
19 nondebtor subsidiaries who have causes of action as a result of
20 this have meritorious ones or not. I'm here on the black-
21 letter law, for all the reasons in our objection, which I will
22 spare Your Honor and not repeat, because I know you read them,
23 however quickly. I know Your Honor understood them. We think
24 they're compelling and ironclad. But I'm not going to repeat
25 them. For all those reasons, we don't think this language, "or

1 any enterprise of the debtors", can be interpreted to mean
2 subsidiaries of the debtors within the contours of the law.
3 Cannot do, this was overreaching, if that's what this means.
4 And this can be fixed either by striking the words "or any
5 enterprise of the debtors", or simply Your Honor saying -- Your
6 Honor issues this order, even though the drafting was proposed
7 by others, saying when you sign this you don't intend that
8 enterprise means subsidiaries of the debtors. It's as simple
9 as that.

10 THE COURT: I'm going to give others an opportunity
11 to comment on this point, because I know from experience that
12 the no successor liability provision is more often than not of
13 extraordinary importance to the purchaser. And if the
14 purchaser is willing, through counsel, to confirm that "or any
15 enterprise of the debtor" is as that term is used in paragraph
16 10(c) of the order, is not intended to extend to any subsidiary
17 of the debtors, that confirmation or an edit that's consistent
18 with that confirmation would seem to satisfy you. Correct?

19 MR. BIENENSTOCK: Yes. I just have to say, and I
20 apologize for the repetition, that this is where we just have
21 to rely on the Court. Of course, a purchaser will want all the
22 protection it can get. This -- regardless of its desire -- I
23 mean, if I'm the purchaser, why wouldn't I say no, I want that
24 to mean subsidiary. Of course I would say that.

25 THE COURT: No, the problem with --

1 MR. BIENENSTOCK: But it's illegal.

2 THE COURT: -- I don't want, at the moment, without
3 hearing from purchasers' counsel, to start to comment on my
4 interpretation of this language at this hour. But I could do
5 so. And I don't want to do that without knowing what position
6 the purchaser takes with respect to it. I'm offering that up
7 as an opportunity. Otherwise, I may say some things that you
8 might not want to hear.

9 MR. BIENENSTOCK: Thank you.

10 MS. GRANFIELD: Good evening, again, Your Honor.
11 Lindsee Granfield, Cleary, Gottlieb, Steen & Hamilton, LLP, on
12 behalf of Barclays Capital. The problem -- I have no problem
13 with Mr. Bienenstock's first point, but the coupling of the two
14 do cause a problem because, essentially, I see the parties to
15 the asset purchase agreement are the debtors. Those parties,
16 up until the time that the trustee came in, controlled their
17 subsidiaries. These are, I think, all wholly owned
18 subsidiaries or for the most part wholly owned subsidiaries.
19 The trustee came in, exercising his control in terms of his
20 business judgment to exercise his control here.

21 With respect to claims that in their exercising their
22 control over the subsidiaries that there should be an
23 allocation of the purchase price with respect to what's
24 happening here, you know, obviously, I agree with Mr.
25 Bienenstock, that doesn't affect the purchaser, and so we have

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1 no objection to it. But if he's saying he wants his cake and
2 he wants to eat it too, which is he wants to make claims
3 against the proceeds, like everyone's just agreed, and now he
4 wants to keep open the ability not just to question the
5 business judgment of the controlling parties of the
6 subsidiaries in entering into the transaction, but he wants to
7 leave Barclays open. Barclays is making this transaction
8 possible to claims by subsidiary creditors that Barclays is a
9 successor and Barclays, after having had to renegotiate this
10 deal many times over the last few days, lost the 700 million
11 dollars in cash it was originally going to receive, lost other
12 benefits under the deal. No, we can't agree to that. And I
13 would have to go talk to my clients about how strongly we feel
14 about that. But if it were up to me, that would be it. That
15 would be the final cut.

16 THE COURT: Okay. Now, I know what you think.

17 UNIDENTIFIED SPEAKER: Your Honor, you ready for the
18 next objector or --

19 THE COURT: Well, we sort of have a pregnant pause
20 here. This is an unresolved issue, and I don't mean to
21 diminish the significance of it by describing it as a drafting
22 point because it's not. The problem with the language as it's
23 presently drafted is that it's wildly ambiguous. The term
24 enterprise is not defined. And in common parlance it could
25 include joint ventures, other business activities. It's not

1 limited to nor does it address subsidiaries, it's actually far
2 broader. And I suppose it was made as broad as it was made
3 deliberately.

4 I don't know what the term is intended to convey in
5 terms of its meaning. Nor do I believe, based upon my looking
6 at it for the first time and not hearing any discussion as to
7 what was the intent in the drafting of it, that I'm in a
8 position now to do what Mr. Bienenstock has asked me to do,
9 which is to do God's work.

10 I believe that if it's left as it is, without further
11 definition, that we'll be revisiting this another day. And I
12 certainly don't want to invite further potentially burdensome
13 litigation over the point. Nor do I have any idea as to
14 whether or not what we're talking about is a theoretical
15 discussion, which I'm happy to engage in at any hour, or a
16 practical discussion involving meaningful rights of Walt Disney
17 Company. Based upon the pleadings filed by Mr. Bienenstock on
18 behalf of his client who is still objecting and the questioning
19 that he has presented of witnesses this evening, it's apparent
20 that he is doing what he can do to protect claims against an
21 identified counterparty. I don't know what those claims are at
22 the moment in terms of their net value, and I don't need to
23 know.

24 For purposes of this order, however, I'm going to
25 need to look at it very carefully because this is one

1 highlighted example of provisions in a sale order that I had
2 not had a chance to review, partly because it's now 10:33 and
3 because I haven't had a chance yet to review the order although
4 I promise I will do so as expeditiously as I can and given the
5 fact that there is an objector waiting in the wings --
6 actually, it is a wing over there, we're not getting this done
7 before 10:45. That's apparent. I'm going to make the
8 following suggestion, and I'm not trying to delay anything.
9 I'm going to hear all the objections this evening. I'm going
10 to hear the debtors' response to those objections, and I think
11 that Mr. Miller, or any other member of his team that he
12 designates, is entitled to speak to the Court while all of this
13 is fresh. But it's also clear to me that assuming I rule, and
14 I'm going to rule one way or the other this evening, in favor
15 of the transaction and an order needs to be entered, I think
16 that everybody should be spending a little bit more time than
17 we have this evening since it's no longer critical in terms of
18 timing to make sure that language issues, such as the issue
19 identified by Mr. Bienenstock, are addressed to the
20 satisfaction of everyone involved in the transaction.

21 I have reserved, just in case it might be needed,
22 this courtroom for tomorrow morning at 10 a.m. I'm not
23 suggesting that it's going to be necessary for anybody to come
24 back. But in the same way that parties mentioned to me that
25 10:45 this evening was a time that I might take into

1 consideration, I wanted you to know that I didn't have any idea
2 one way or the other as to how long this hearing would last or
3 how much time would be required to address the many objections
4 that float in, particularly at the last minute. So to the
5 extent that it's not critically important to the transaction
6 that an order be entered this evening, I'm going to suggest
7 that time be spent to make sure that it's right and that I've
8 had a chance to consider it fully so it can be entered tomorrow
9 morning, assuming that I approve the transaction. That's my
10 comment with respect to this language point. Mr. Rosner?

11 MR. ROSNER: Thank you, Your Honor.

12 MS. GRANFIELD: I apologize, Your Honor. I apologize
13 to Mr. Rosner.

14 THE COURT: Once again, for record purposes, I just
15 think you're too far away from the mike unless you speak at the
16 podium.

17 MS. GRANFIELD: I apologize, Your Honor, and I
18 apologize to counsel. Just --

19 THE COURT: This is Lindsee Granfield speaking on
20 behalf of Barclays.

21 MS. GRANFIELD: Lindsee Granfield speaking on behalf
22 of Barclays. I wanted to -- just because obviously we did not
23 have an opportunity to respond in writing to the different
24 arguments or Mr. Bienenstock's writing just if I may, or if
25 it's all right with Your Honor, I'd like to cite and I'd like

1 to hand up to Your Honor the order authorizing a similar
2 transaction in the Refco Chapter 7 case where exactly the same
3 language on successor liability was used, if that is
4 permissible?

5 THE COURT: It's permissible but it's completely
6 unnecessary.

7 MS. GRANFIELD: Okay.

8 THE COURT: And I suggest that whatever language
9 appears in any other order is of no significance to me. Just
10 because something was entered in another case because it wasn't
11 picked up by a parting interest who was concerned about it does
12 not, to me, influence this outcome.

13 MS. GRANFIELD: Very well, Your Honor.

14 MR. ROSNER: Thank you, Your Honor. David Rosner,
15 Kasowitz, Benson, Torres & Friedman on behalf of the Bay Harbor
16 Entities. And to state something obvious, there's clearly some
17 momentum behind this takeover of this company and we recognize
18 that. And we recognize that in making our objection, and we
19 recognize that there are some very important human elements to
20 the transaction that I know in the dollars and cents world of
21 bankruptcy sometimes people do lose sight of and I think that
22 on all sides here nobody has lost sight of them and I think
23 that they are important.

24 One of the main arguments, and I understood
25 Mr. Golden when he said it and I thought it was right even

1 though it may not be the most appealing thing to say but it is
2 right that this global markets argument is not really directly
3 on point as to what is being done in front of Your Honor in
4 terms of this estate and what is happening to creditors.
5 Though I understand that the Court does take a macro view of
6 certain things, but one of the arguments in favor is that
7 getting this deal done will build confidence in the market and
8 that's kind of just been taken as a given, almost, by many of
9 the parties here. People can look at the way this transaction
10 actually got created and determine whether Barclays' behavior,
11 whether the position that Lehman found itself in, whether that
12 is market confidence building or if that is detrimental to the
13 market, nobody really knows. And as I think we've seen over
14 the last couple of weeks, nobody really knows a lot about when
15 people make moves -- people in positions of power make moves
16 that they think are going to stabilize. Perhaps they are
17 really unstabilizing. But what you're being asked for here to
18 do today is to be a federal court granting its imprimatur on a
19 transaction where we know -- and the PWC as the administration
20 of a U.K. entity has submitted a declaration that eight billion
21 dollars was transferred from the U.K. entity into the United
22 States rendering that entity unable to trade, delisted,
23 insolvent and that money disappeared and that money is gone.
24 And by money, I mean money and securities. Now, I will
25 respectfully disagree with you, Your Honor, on some things that

1 you have said and we have heard tonight. Unquestionably, you
2 wear the robe and this is your courtroom and you make the call.

3 THE COURT: No, this is our courtroom. It's not my
4 courtroom. This is the people's courtroom, but I'm not
5 Judge Wapner.

6 MR. ROSNER: Clearly, Your Honor. Clearly.

7 THE COURT: This is -- I'm serious about this. I
8 feel very strongly that we're here for a public purpose and my
9 name just happens to be on the door.

10 MR. ROSNER: I appreciate that, Your Honor, very
11 much. And what I will say is that I do respectfully disagree
12 with Your Honor as to whether this process comports with due
13 process as it's understood under the Bankruptcy Code and as
14 it's understood under the Constitution. It's an important
15 point. It is one that has been discussed tonight to some
16 degree but it is one that Your Honor did speak to quite
17 directly earlier, and I took those points and I just want to
18 state for the record that our view is that the eight billion
19 dollars has not been investigated. Nobody knows how that
20 happened. Nobody knows who knew about that transfer. Nobody
21 knows whether -- and by nobody here in our people's court, I'm
22 including Your Honor as saying nobody knows that, because Your
23 Honor certainly doesn't know because no one has been able to
24 present evidence to Your Honor as to who was involved in the
25 transfer and --

1 THE COURT: I'm having a problem with this argument
2 right now, so you might as well know it rather than continue
3 it. I don't understand the relevance of this. I understand
4 that it's a big number, it's a huge number. And I understand
5 that you've asked questions of Mr. McDade about his knowledge
6 of the transaction, and he didn't provide a lot of information.
7 And I paid attention to the fact that he didn't provide a lot
8 of information. But it made no impact on me because I'm
9 confident I'm going to learn a lot about this in the course of
10 this case. The question that I have for you, and you're
11 pressing this point now, is what does this have to do with
12 whether or not it is in the best interest of this estate to
13 approve this particular transaction which is the only available
14 transaction tonight? What does this have to do with what we're
15 here to consider?

16 MR. ROSNER: What it has to do with, Your Honor, is
17 akin to what you were talking about, about the terms of the
18 order, is that if you approve this sale and if you permit an
19 order to be entered like this sale order then all those
20 securities that were transferred from the U.K. to the U.S. are
21 now going to be transferred to Barclays and that will be it.
22 And anybody's rights --

23 THE COURT: I thought this was a cash sweep. Is this
24 a securities sweep?

25 MR. ROSNER: As I understood, there are going to be

1 securities. I heard tens of -- millions of -- billions of
2 dollars of securities that are going to be transferred pursuant
3 to this transaction.

4 THE COURT: Well, there's actually --

5 MR. ROSNER: And cash, but --

6 THE COURT: -- there's absolutely nothing in the
7 record, Mr. Rosner, about even what we're talking about. This
8 is a reference to news articles that appeared, speculation in
9 the press. Having read some articles about myself lately, I
10 know that there are a lot of things in the press that are just
11 plain wrong. And I've always known that.

12 MR. ROSNER: You have a declaration --

13 THE COURT: My apologies to any members of the press
14 who may be watching this or listening in. The reason I make
15 this point is that just because there is scuttlebutt about
16 something doesn't mean it's properly before me. And it's a
17 huge amount of money, and it's a matter of great significance
18 and I'm confident that it will be addressed. But I thought I
19 heard someone say earlier that there's no intention, as a
20 result of this transaction, to affect what rights may exist
21 with respect to that transfer.

22 MR. ROSNER: Well, except -- and if that's the case
23 Your Honor, and if --

24 THE COURT: Did I mishear that?

25 MR. ROSNER: Well --

1 THE COURT: I may have.

2 MR. ROSNER: Except, I think, that the purchaser is
3 seeking to cut off any rights for people to trace their
4 property to the purchaser. That's the whole point of tonight's
5 proceeding is for the purchaser to be able to say it is taking
6 assets that were in our view and in the view of PWC, who did
7 submit a declaration to Your Honor. This is not a newspaper
8 story; it is a declaration that states that in just a few days
9 the joint administrators have identified more than eight
10 billion such funds that are due to LBIE but that LBIE does not
11 hold. It's not a newspaper article. The administrators know
12 what they're -- excuse me.

13 MR. MILLER: Your Honor, it's pure speculation as to
14 what was transferred, if there was a transfer. There's nothing
15 in the record on this at all.

16 MR. ROSNER: That's the point. There's nothing in
17 the record --

18 THE COURT: I think we all agree. There's nothing on
19 the record on this point.

20 MR. ROSNER: But that's a critical omission on the
21 debtors' part because what the debtor is seeking to do is if
22 you look at the sale order what the debtor is seeking to do is
23 to have Your Honor find that the debtors had good title to
24 these assets. Not they have the right, title and interest to
25 these assets, that they have good title to these assets and

1 that upon the sale to Barclays, Barclays will have good title
2 to these assets. And those are findings that this Court can't
3 make because there has been no evidence that has been
4 introduced by the debtors. There's been no record made by the
5 debtors that these assets that are being transferred are not
6 the assets that were transferred by LBIE. The debtor has
7 chosen not to put on that case and has not put on any evidence
8 to demonstrate that it has title to the purchased assets.

9 Now, you did say just a moment ago, Your Honor, and I
10 listened to you out in the wing, that the order's going to need
11 some study? And everybody's going to need to take a look and
12 study? But that is a critical point of this order because to
13 say that the debtor has to have this Court make a finding that
14 the debtor has good title in the face of the knowledge that
15 there was a transaction of this magnitude, and what we're
16 talking about is customer property. Customer property, the
17 people who broker dealt -- who prime broker dealt with LBI and
18 whose property was then moved to the U.K. and then that
19 property disappeared and it disappeared, we believe, through a
20 transfer on Friday and no replenishment. And that, we believe,
21 is the very same property that is being sold. But the order
22 that you're being asked to enter is to say they have good title
23 today. Well, they don't have good title today. They can't
24 prove that they have good title today and they certainly
25 haven't tried to prove that they have good title today. And

1 what we've said, Your Honor, is that we have -- we own our
2 property. It is -- I think Mr. Bienenstock made this point
3 when we were dealing with subsidiaries and I believe counsel
4 for Barclays said at some point it was going to come up with an
5 argument and Your Honor said it better be a pretty darn good
6 argument but that a debtor can't sell what it doesn't own. We
7 own our property. If our property was transferred without our
8 consent into LBI, even with our consent, it's still our
9 property and they don't have good title and they can't sell it.
10 So our liability -- Barclays has to remain liable to return our
11 property or to honor our constructive trust. And that's why
12 it's highly relevant to these proceedings, Your Honor.

13 THE COURT: Has there been any attempt, prior to your
14 articulation of this argument this evening, to determine the
15 willingness of the parties to this transaction to reserve with
16 respect to this claim for repatriation of the funds that were
17 transferred on the Friday before the Monday of the filing?

18 MR. ROSNER: We put that in our papers as the
19 alternative to denial of the sale because it's always good to
20 have a second option on the denial that we sought. But in
21 fairness, I think that we have not had that discussion. There
22 was a meeting at Weil, I spoke with Ms. Fife yesterday; I had
23 actually sent her an e-mail and sent an e-mail to another
24 person. I wasn't here on Wednesday, but I understood that they
25 had said partners would be available 24/7. I reached out to

1 say can we have a discussion. I was advised to come to Weil at
2 3:00, which I did. And I listened to the presentation and I
3 asked my questions. And the answers I got were I don't know.
4 And I don't mean that disrespectfully or disparagingly but no,
5 the answer is no. We would reserve for our property. I will
6 tell you that, Your Honor. We would take our property and we
7 would reserve for it and say let's make sure that we have a
8 full and good claim to the ability to recover our property
9 since it was taken from LBIE and transferred into this estate
10 and is now being sold.

11 I get back to your point, Your Honor, and not to beat
12 it again, there's a lot of things -- the Bankruptcy Code is a
13 very powerful document. It gives us the ability to come into
14 court just a few days after a filing of Lehman's size and seek
15 to sell pieces of the company that Mr. Flics says it doesn't
16 even own pieces of the company. The Bankruptcy Code gives us
17 that but it doesn't give us the right to sell what it doesn't
18 own. A debtor cannot do that. 363 says property of the
19 estate. It doesn't say whatever property it wants to. It
20 can't sell my -- well, it can't sell my client's property, it
21 can't sell my property either but it can't sell my client's
22 property.

23 THE COURT: I guess I'm having a problem with what
24 you're saying. I've heard you say it, and I think you've
25 almost said it enough because I know your argument. But

1 because this isn't in the record, this is just argument, and
2 because the Lehman Enterprise transferred routinely cash and
3 other securities in staggering amounts clearing from one
4 continent to another all the time, and we're dealing with
5 issues relating to separate estates, one in the U.K. and this
6 one here, and including SIPC estate we have two, I don't know
7 whose property this is.

8 MR. ROSNER: Exactly.

9 THE COURT: And it may not be the estate that you're
10 asserting it belongs to. It may not belong to the
11 administrators. All you're doing is asserting on behalf of
12 your client a claim derivative of the claim that the
13 administrators would make. And you know what? I don't know if
14 it's right. So because we are approaching 11:00 at night and
15 dealing with no evidence with respect to the underlying premise
16 of your argument I think it's time to move on.

17 MR. ROSNER: Fair enough, Your Honor. I'll just
18 close off that piece and I will move on to the next argument is
19 that your last statement that we don't know is the statement
20 that I believe is correct. And when you talked about the
21 transfers around Lehman, which I don't think was actually
22 testified to but when you spoke of that, I'm still talking
23 about customer property. I'm talking about our property. No
24 matter how many times it gets moved, it's still our property
25 and it can't be sold.

1 THE COURT: Excuse me a second. If you're talking
2 about customer property you represent a particular fund or a
3 family of funds --

4 MR. ROSNER: Yes.

5 THE COURT: -- and segregate accounts and that kind
6 of thing. Yes?

7 MR. ROSNER: Well, yes, except that the property was
8 moved out, yes.

9 THE COURT: And how much are we talking about in the
10 case of your client? It's not eight billion dollars.

11 MR. ROSNER: No, unfortunately for them it's not --
12 fortunately, it's not eight billion dollars but it's a very
13 sizable figure that I'm --

14 THE COURT: What are we talking about?

15 MR. ROSNER: It's actually something I'd prefer to
16 tell Your Honor in chambers as opposed to make a public
17 statement on the number. But I would say --

18 THE COURT: Here we go again with hedge funds not
19 wanting to talk out loud.

20 MR. ROSNER: I didn't say they were hedge funds, you
21 said funds.

22 THE COURT: I don't know if they're hedge funds or
23 not.

24 MR. ROSNER: Thank you.

25 THE COURT: I'm just reminded of the old 2019 issues.

1 MR. ROSNER: Me too.

2 THE COURT: I understand your argument. And your
3 argument is fundamentally we need to look more closely at the
4 order so that you can protect the interest of your clients, and
5 I agree you should.

6 MR. ROSNER: There's another part of this record that
7 hasn't been made. In the overall point here that I think we
8 kind of talked about in somewhat of a generality is that they
9 have the burden of proof here. The burden of proof on each
10 element. You did talk about evidence that was given, evidence
11 that wasn't and there was some cross-examination. But the
12 debtors have the burden of proof of demonstrating each of the
13 elements that they need to demonstrate. And they didn't put a
14 record on regarding the good faith purchaser findings that they
15 are seeking to have found by Your Honor.

16 THE COURT: Oh, I totally disagree.

17 MR. ROSNER: Well --

18 THE COURT: I totally disagree. One of the things
19 that I try to do, I may not succeed perfectly, but I try to
20 listen with great care to the evidence that's being put into
21 the record to support findings, and I heard ample evidence both
22 in the McDade and in the Ridings proffer that would support
23 good faith findings here. This was an arm's length
24 transaction, negotiated aggressively' it arose in two stages
25 after the deal fell apart. At the end of the weekend they

1 restarted it, it was brisk, everybody was concerned about the
2 markets, this is all going at a breakneck speed but in terms of
3 good faith, everything that I heard was indicative of arm's
4 length, good faith, aggressive negotiations. And, in fact,
5 what occurred this evening in court with respect to the fair
6 value of the real estate is a further concrete example of that
7 negotiation. So I reject completely the assertion you've just
8 made.

9 MR. ROSNER: Then I'm going to leave that one alone,
10 Your Honor.

11 THE COURT: I think that's a good idea.

12 MR. ROSNER: There are some other problems in the
13 order and I appreciate that you said that we have to look
14 carefully at it. But there is one that I want to point out to
15 Your Honor and then talk about the alternative that we were
16 talking about just a moment ago. And I don't know if this was
17 simply a drafting point, but it does seem -- didn't write the
18 paragraph number, the word "interest" -- Mr. Bienenstock
19 mentioned that the word "interest" is a defined term in here
20 and it includes all claims. But then the order itself actually
21 releases the debtor from all interests and I don't know if that
22 was the intention of the order. I'll get to it in a minute.
23 It's in paragraph -- it was in paragraph 24 --

24 (Off the record)

25 MR. ROSNER: Okay. I'm sorry. It's actually

1 paragraph 8. Thank you. Is this something revised or -- this
2 is the revised one?

3 UNIDENTIFIED SPEAKER: That's the one I handed up
4 this evening. I need that back.

5 MR. ROSNER: Okay. It's in paragraph 8 called
6 Release of Interests. And it said "that the order shall be
7 effective as a determination on the closing date all interests
8 of any kind or nature whatsoever existing as to the debtors for
9 the purchased assets have been unconditionally released,
10 discharged, and terminated". And since interest includes all
11 claims and, as we said earlier, includes everything under the
12 world, this would actually constitute a general release to the
13 debtors. And I don't think -- I'm hoping that that's not what
14 was intended, but it is what it says.

15 THE COURT: Well, here's what I think, and I
16 understand the point and you've made it and I think it needs to
17 be addressed.

18 MR. ROSNER: Thank you, Your Honor.

19 THE COURT: But I'm not ruling on it at this moment.
20 I believe that what this is about is a drafting point. And I
21 don't think that this courtroom should be converted into a late
22 night session in somebody's law firm. This is a hearing to
23 approve a sale or deny approval of a sale. We've already
24 reserved on the question of the form of the order and I've made
25 it clear that I have as a fallback, if people can't agree, that

1 we can have a further hearing to flush out ongoing issues
2 concerning the form of the order tomorrow morning at 10 a.m. I
3 intend to be here. And anybody's who's interested can show up.

4 MR. ROSNER: Got it, Your Honor. I'll close with
5 just saying, and maybe I'm stating the obvious, I hope not, but
6 I recognize that it's a lot to do. It's a lot to ask this
7 Court to do that which is in the face of the massive pressure
8 that is being brought to bear on this transaction to say no,
9 I'm not going to approve it or no, I'm actually going to
10 adjourn it to allow people to take some reasonable amounts of
11 discovery investigation to learn if there are facts that should
12 be presented to the Court which we haven't been able to present
13 to the Court because there hasn't been an ability to do that.
14 I recognize that that's a huge burden to be placed on the Court
15 and that's why you wear the robe in the people's court and we
16 don't and we don't have to make that tough call. And people
17 have said that this transaction is unprecedented and I think
18 that's right. But unprecedented transactions lead to bad
19 precedence as well. And I would just ask -- urge Your Honor to
20 consider what's before you, consider the interests of the
21 creditors, all the arguments that have been made and I hope
22 that you will either deny approval of the sale, adjourn it for
23 some brief period of time or in our case, allow for a set aside
24 so that we can preserve our interests as to specific property.
25 Thank you, Your Honor.

1 THE COURT: Thanks, Mr. Rosner. Is there someone
2 else who wishes to be heard?

3 MR. LEMAY: Your Honor, my name is David Lemay from
4 Chadbourne & Parke and I won't consume more than about three
5 minutes of the Court's time. I, too, am part of the LBIE posse
6 and I rise only to suggest what I think could be a very modest
7 change. My client, Amber Capital Management, does not seek to
8 have liabilities foisted on the transferee. We know that's not
9 really something that's ever going to happen. We don't seek to
10 stop the sale. Indeed, our client thinks that it's fine that
11 the sale goes ahead. We have a couple of drafting issues on
12 the order. I think what I've heard is I should stow those for
13 now and talk about them with counsel.

14 THE COURT: Yes.

15 MR. LEMAY: I'll do that, of course. One thought
16 that I had, though, Your Honor, that would go a long way to
17 placating the LBIE constituency, would be since there are these
18 arguments and yes, at this point there's no record to support
19 them one way or the other about who owns the assets that are
20 being transferred, one classic way that courts deal with that,
21 of course, is to just make sure that the proceeds -- the
22 proceeds that the debtors receive, both the SIPA debtor and the
23 Chapter 11 debtor, are put in a safe place where you can make
24 those decisions later on. So I am going to simply suggest to
25 Your Honor that I think the LBIE constituency would be very

1 well served, and no one else would be prejudiced, by adding a
2 minor substantive in the future and that's simply if the sale
3 price is effectively the escrow subject to further order of
4 this Court. As I say, I've got drafting issues; I'll take
5 those up later and that's really it for me, Your Honor. Thank
6 you very much.

7 THE COURT: Thank you, Mr. Lemay. Just so I get a
8 sense of how many people who are standing are standing waiting
9 to speak? One, two, three, four? Okay.

10 MR. TALMADGE: Your Honor, I'll be extremely brief.
11 Scott Talmadge from Kaye Scholer for Wells Fargo. We had filed
12 a brief objection. It raises the same points that Mr. Sabin
13 had raised with respect to the nondebtor subsidiary's assets.
14 And we believe that that can be resolved by a drafting in the
15 order, but we'll have to see what happens with respect to that.
16 That's all I'm going to say because we might be here a while.

17 THE COURT: Thank you.

18 MR. FLANIGAN: Your Honor, my name is Dan Flanigan
19 and I represent BATS Holding, Inc. I'll not only be brief but
20 I'll talk as fast as I can.

21 THE COURT: Don't do that because we won't understand
22 you.

23 MR. FLANIGAN: All I'm seeking, Your Honor, is
24 confirmation on the record of what I think I heard off the
25 record at the earlier presentation and that is that none of the

1 stock owned by the debtor in BATS Holding, Inc. is going to be
2 sold to Barclays in this transaction. Thank you.

3 THE COURT: That has been confirmed. Okay. Next.

4 MR. GREGOR: Good evening, Your Honor. Michael
5 Gregor of Allen Matkins Leck Gamble Mallory & Natsis on behalf
6 of Constellation Place, LLC as well as SunGard Expert
7 Solutions, LLC and certain affiliated entities that are
8 affiliated with SunGard as reflected in the opposition that we
9 filed today. Your Honor, initially, I have not yet filed a
10 property application. I request authority to --

11 THE COURT: I'm hearing you now. It's fine.

12 MR. GREGOR: Thank your, Your Honor. Very quickly,
13 with respect to Constellation, Your Honor, my client is a
14 landlord of the Los Angeles premises that are going to be
15 assumed. Section 8.14 of the APA provides that immediately
16 upon assumption there will be a sublease back and the point
17 that we have is simply that while the code allows for an
18 assumption and an assignment, there's no right to compel a
19 sublease back once the assignment occurs. And any -- our point
20 is simply that any subleasing should occur in certain forms
21 with the terms and conditions of the lease, whatever those
22 terms are.

23 The second point, Your Honor, is with respect to the
24 terms of the assumption. The APA provides that Barclays will
25 only be responsible for post-closing obligations under the

1 leases, not pre-closing, and while normally defaults are taken
2 care of with a cure, and it shouldn't be an issue with
3 landlords in particular, it does create an issue because there
4 are obligations relating the pre-closing period such as CAM
5 reconciliations, indemnity obligations and otherwise that may
6 arise post-closing but relate to pre-closing activities that no
7 one knew about prior to the closing. And our position, Your
8 Honor, is simply that in connection with the lease assumption,
9 Barclays should be required to assume the obligations as -- all
10 the benefits and burdens of the lease, not pick and choose,
11 just the post-closing liabilities with respect to our
12 leaseholds.

13 Moving on, Your Honor, with respect to SunGard,
14 SunGard has approximately forty agreements with some of these
15 debtors. It has not had the opportunity to review which
16 agreements are being proposed to be assumed and assigned.

17 THE COURT: I'm confused about something. As to
18 these agreements, are these agreements that are closing date
19 agreements or designated agreements to be --

20 MR. GREGOR: The debtors --

21 THE COURT: -- selected within the next sixty days?

22 MR. GREGOR: The debtors' notice of assumption
23 designated approximately forty-two of the SunGard agreements
24 for closing date contracts.

25 THE COURT: Okay.

1 MR. GREGOR: And the point here is simply that we
2 haven't had a chance to review our objections with respect to
3 those. There may be issues pertaining to whether or not the
4 debtor entities are the parties to this contract. It may be
5 nondebtor affiliates that are the parties to the contracts as
6 well because the contracts relate to IP; they may be
7 nonassignable under nonapplicable bankruptcy -- under
8 applicable nonbankruptcy law. And we reserve our rights to
9 raise any of those objections.

10 THE COURT: All right. Your rights are reserved.

11 MR. POURAKIS: Constantine Pourakis of Stevens & Lee
12 on behalf of 1301 Properties, LLP, the owners of the 1301
13 Avenue of the Americas building. Just a couple of questions.
14 Our understanding is that the assignment will not be taking
15 place tonight but the assumption will. We just want to know if
16 the order will provide -- there will be a provision saying that
17 the assumption of the contracts is effective as of today.

18 MR. MILLER: The transaction is approved by the
19 board.

20 MR. POURAKIS: Okay. Second, in our objection we
21 just stated that the debtor failed to provide any proof of
22 adequate insurance due to performance. Is there going to be
23 any kind of reserve for unpaid rent obligations?

24 THE COURT: I'm sorry, what did you say?

25 MR. MILLER: Adequate assurance, Your Honor.

1 THE COURT: Adequate assurance of future performance?

2 MR. POURAKIS: Yes, Your Honor.

3 THE COURT: Is the Barclays?

4 MR. POURAKIS: Well, we understand this is not
5 Barclays PLC. We understand it's a subsidiary. We're not sure
6 who the actual entity is who's buying this asset.

7 THE COURT: Well, this is the first challenge I've
8 heard to the financial wherewithal of Barclays, and I'm
9 intrigued by your position. I'm not sure what you're looking
10 for.

11 MR. POURAKIS: When we filed the papers we still
12 weren't clear as to who was the proper entity. How these --
13 our client was; it was not so that's why we raised that
14 objection -- our objection. We just wanted to make sure.

15 THE COURT: Well, my suggestion is that at some point
16 we're going to take a break and that you have a conversation to
17 adequately assure yourself that things are fine. And if you're
18 not, we can revisit it.

19 MR. POURAKIS: We're fine with that, Your Honor.

20 THE COURT: Okay.

21 MR. POURAKIS: Thank you.

22 MR. KADEN: Excuse me, Your Honor.

23 THE COURT: Who are you?

24 MR. KADEN: I'm a disembodied voice. Greg Kaden of
25 Goulston & Storrs. I understand from the debtor that the

1 objectors who are on the phone were muted for a while and I
2 just wanted to make sure that we weren't forgotten about; that
3 at least one objector, myself, on behalf of two clients, has
4 objections to raise as well. And I don't mean to take my turn
5 out of order, but I can't see what's going on in the courtroom
6 and I just wanted to make sure that in the late hour people
7 didn't start filing out of the courtroom and have us be left on
8 mute on the --

9 THE COURT: Well, you did a very graceful job of
10 jumping the line. We're not going to let you --

11 MR. KADEN: I apologize, again, for the interruption,
12 Your Honor.

13 THE COURT: Okay. What I'll do is when people in the
14 courtroom have finished their presentations I'll give you a
15 signal and you can express your position for your clients.

16 MR. KADEN: I appreciate that, Your Honor. If I
17 could indulge one further request relating to my handicap of
18 being outside the courtroom. Is there some way that the
19 debtors could either have their claims agent call us or e-mail
20 to the service list the proposed form of order that's being
21 discussed?

22 THE COURT: It's a reasonable request for those who
23 are actively engaged in this hearing remotely and judging from
24 the nods that I see at counsel table for the debtors, that will
25 be done. I just don't know when it will be done but it will be

1 done.

2 MR. KADEN: Okay. Thank you, Your Honor.

3 MR. ELROD: Thank you, Your Honor. David Elrod on
4 behalf of TransCanada Pipelines and its affiliates. We filed a
5 limited objection and I think that it has been essentially in
6 part resolved by statements that occurred when the Court left
7 the courtroom and we had an update by counsel for the debtor on
8 what's not included in the sale. And I just wanted to make
9 that clarified on the record, Your Honor, because it hasn't
10 been confirmed yet. It's our understanding that Lehman
11 Brothers Commodity Services, Inc., Eagle Energy Partners, ULC
12 and Eagle Energy Partners I, L.P. assets are not part of this
13 transaction, this purchase agreement, and that the transaction
14 will not affect their ability to operate as an entity.

15 THE COURT: It was hours ago that I heard that but I
16 believe that to be true. Ms. Fife, is that true?

17 MS. FIFE: Yes it is, Your Honor.

18 MR. ELROD: Thank you, Your Honor.

19 THE COURT: Okay.

20 MR. ANGELICH: Good evening, Your Honor. George
21 Angelich of Arent Fox, counsel to the Vanguard Group, Inc. The
22 mutual fund so many Americans, millions of them, indeed, trust
23 their money with Vanguard. And, Your Honor, people are in a
24 panic mode in America and not acting rationally on many fronts
25 in the economy. And I think, Your Honor, the global economy

1 argument that you've heard tonight as a rationale for speeding
2 this process up and taking the expedited approach that's been
3 taken and utilized by this Court, it needs to be responded to
4 one more time.

5 Your Honor's discretion in judgment is really the
6 only counterbalance at the moment and waiting and giving a
7 little additional time to this process and allowing the debtor
8 the opportunity to go out and market these assets for perhaps
9 an additional period of time, just two weeks, might engage a
10 competitive process because Barclays is probably not going
11 away. They're getting a fire-sale deal here for these assets
12 and I think that approving a deal in the middle of the night
13 will not do much to assure the markets of an improvement to the
14 economy, it may actually have the opposite effect. So, Your
15 Honor, we would ask that you --

16 THE COURT: Could you explain how approving this
17 transaction could possibly have a negative effect on the
18 markets?

19 MR. ANGELICH: Well, Your Honor, there could be a
20 negative impact because there could, in fact, be additional
21 value that could be realized through a competitive fitting
22 process. If there are indeed -- if there's no one else out
23 there --

24 THE COURT: I don't think you've answered my
25 question. You've made the assertion that you thought that my

1 putting this off is somehow a plus for the markets? Was that
2 your assertion?

3 MR. ANGELICH: Indeed, Your Honor. It may very well
4 be. This week we've seen an improvement in the markets. There
5 has been an opportunity for stabilization for --

6 THE COURT: I'm sorry, but I've been down this road
7 with other arguments in terms of relative speculation and I
8 think I addressed it with Mr. Golden when he was pressing me
9 hard on that very same point. So I've heard it, and I will
10 consider it.

11 MR. ANGELICH: Thank you, Your Honor.

12 THE COURT: Is there anyone else in the courtroom who
13 wishes to be heard? All right. We go to the telephone list
14 and I'm not sure how many people who are participating by phone
15 are objectors. Please identify yourself and speak up.

16 MR. KADEN: Good evening, Your Honor. It's Greg
17 Kaden at Goulston & Storrs on behalf of two clients,
18 Interactive Data Corporation and 125 High Street, L.P., each of
19 which filed an objection. I'll start with Interactive Data
20 Corporation.

21 Some of my objections have been -- or reservations of
22 rights, so to speak, have been raised already so I'll try to
23 make it brief and hopefully incorporate the concessions that
24 have been made in response to those similar objections.

25 Interactive Data Corporation, to begin with, along

1 with its affiliates, provide data and related services to the
2 debtors and their affiliates, pursuant to a global services
3 agreement. The global services agreement sets forth universal
4 terms and conditions for the specific projects that Interactive
5 undertakes for the debtors and affiliates. Now, those specific
6 projects are governed by other agreements called schedules.
7 But the schedule is subject to all of the terms and conditions
8 of the global services agreement.

9 Now Interactive compared -- in the limited time that
10 we have, compared the agreements that the debtors proposed to
11 assume and assign against its own books and records but simply
12 has not been able to determine, with any certainty, which
13 agreements the debtors intend to assume and assign.

14 With that said, we would first ask that the debtors
15 and Barclay work with Interactive to determine which contracts
16 are being assumed and assigned. I believe that the parties
17 have already undertaken to do that, but given that I've been a
18 little bit handicapped on the phone, I just want to make sure
19 that we have confirmation of that for the record.

20 MR. MILLER: Yes, sir.

21 THE COURT: I don't know if you heard Mr. Miller but
22 I believe he confirmed it.

23 MR. KADEN: Okay. Is that the case?

24 THE COURT: Yes, that is the case.

25 MR. KADEN: All right. Moving on then, Interactive

1 believes that the global services agreement must be assumed and
2 assigned together with any schedule that Barclay is purchasing.
3 That's because they're interrelated and we think that the
4 global services agreement provides the master terms and
5 conditions for the schedules. It actually got intertwined with
6 the schedules. So we respectfully request either that the
7 parties agree to that proposition on the record, namely that
8 the schedules can't be assumed without the global services
9 agreement also being assumed. Or if we can't get that granular
10 at this point, simply confirmation of the issue can be tabled
11 for purposes of today's hearing, without prejudice to
12 Interactive's right to raise the issue post-closing.

13 THE COURT: Is there anybody here in a position to
14 comment with regard to that statement?

15 MR. MILLER: Not the debtors, Your Honor.

16 MS. GRANFIELD: Lindsee Granfield, Cleary Gottlieb
17 Steen & Hamilton, LLP on behalf of Barclays Capital. I think
18 we indicated to the Courtroom, when Your Honor was out of the
19 courtroom, that in working through the issues of the assumed
20 contracts, that we would seek to resolve those issues. The
21 contracts that are the closing contracts, we are asking Your
22 Honor to find are assumed because with respect to many of them
23 they are needed to operate. For instance, the Lehman space on
24 Seventh Avenue and the trading floors there, and other
25 infrastructure in many, many different places. And therefore

1 not to have -- or to have some cloud would be a problem.

2 But having said that, in terms of trying to work out
3 with the counterparties to assume contracts, are there issues
4 about identification? Is there an issue that -- what's the
5 full contract? We obviously realize we have to live within the
6 bounds of 365 in terms of assuming a full contract, can't break
7 up the contract, have to pay the cure cost. Plus, in terms of
8 any accrued amounts, when we assume the contract, even if
9 accrued amounts aren't due yet but then the due date comes up,
10 that's going to be for our account. So that's pretty much the
11 comfort I can give at this time.

12 THE COURT: You don't have to agree that's sufficient
13 but that's all you're getting.

14 MR. KADEN: Pardon me, Your Honor.

15 THE COURT: I said, you don't have to agree right now
16 that that's sufficient but I've heard what she said and I think
17 that's all you're getting in court this evening. Is that
18 satisfactory?

19 MR. KADEN: I guess it's not satisfactory to the
20 extent that these documents are -- the two agreements are
21 physically separate documents. So, to the extent we're talking
22 about assuming all the benefits of one contract, if we can
23 agree that it's one contract, then of course we have no
24 objection. But we just don't know whether the debtors or the
25 Barclays will have an issue that these are, in fact, separate

1 contracts and they don't actually go hand in glove together as
2 part of the assumption and the assignment.

3 So I guess it could be a moot point that we can't
4 even tell whether it's in on the list. For all we know the
5 master agreement already is on the list. But I guess, to the
6 extent I popped a hole into the current circumstances, I would
7 like to reserve the right to raise the argument, with respect
8 to the global services agreement, that that also must come
9 along with any assumption and assignment of the schedules.

10 To the extent that we can't consensually agree or
11 indeed to the extent that the global services agreement isn't
12 already sitting on the schedules to be assumed and assigned or
13 a different name that we simply just can't identify for our
14 books and records.

15 THE COURT: I'm not sure how to say goodbye but I
16 think we're done with what you had to say. I didn't mean to
17 make light of what you said, it's just that you're on the phone
18 and nobody said anything and I think we're done with what you
19 had to say. Anything more?

20 MR. KADEN: I'll move on, then. Finally, although
21 Interactive has determined the cure amount under its contract
22 to, at least the amount scheduled by the debtors, which is
23 596,792 dollars and, I guess, six cents. We think it may be
24 more. However, since the debtors have already scheduled 596K
25 as an undisputed cure amount, we'd have to immediately pay this

1 as an undisputed cure without prejudice to Interactive's right
2 to argue after discussion. Hopefully we can reach a consensual
3 resolution but they will argue, post-closing, that additional
4 cure is required. And I want to make sure that that argument
5 is reserved under Mr. Miller's general postponement of cure
6 objections but also to clarify that any undisputed cure amount,
7 if we agree, as we believed in the 596,000 dollars will be
8 immediately paid as part of the closing.

9 THE COURT: I'm not going to say anything in response
10 to that. Whoever wants to respond, please do?

11 MS. GRANFIELD: Lindsee Granfield, Cleary Gottlieb
12 for Barclays Capital. The proposed order is providing that to
13 the extent -- well, that the cure amounts will be paid as soon
14 as practicable on the earlier of the consent of the party to
15 the cure amount on the schedule, the deemed consent of the
16 party because they don't object on October 3rd or after your
17 Court's determination of the cure amount after dispute.

18 So no, we can't agree that again another party wants
19 to have its cake and eat it too, that if there's a dispute
20 about the amount we either reach agreement, get paid as soon as
21 practicable or Your Honor will determine it.

22 THE COURT: That sounds perfectly consistent with due
23 process and I think everybody can agree that that's so, even
24 this briefly into the case. There'll be an opportunity to be
25 paid an amount that you agree. If you don't object you'll get

1 the deemed amount and if there's a problem there'll be a
2 hearing.

3 MR. KADEN: Fair enough, Your Honor. Thank you.

4 If I can move on now to my second client, which is
5 125 High Street.

6 THE COURT: What time zone are you in?

7 MR. KADEN: What time zone?

8 THE COURT: Yes.

9 MR. KADEN: I'm in the Eastern Time Zone.

10 THE COURT: Okay. Well, then you know how late it
11 is. I wish you'd expedite -- I don't mean anything by this but
12 we've really been going for a long time. It's a very, very hot
13 courtroom and we have a tremendous amount of work to do before
14 we can all go to sleep. So I really ask you to limit your
15 remarks if you can.

16 MR. KADEN: Okay, I will. I'll get to the main
17 issues and many of them have already been raised. So I will
18 try to be as brief as possible and I apologize and I appreciate
19 the Court's indulgence.

20 I would like the same confirmation that the prior
21 landlord has asked for, that the rights of my landlord at 125
22 High, under the lease, with respect to any sublease back to the
23 debtors are preserved consistent with the terms of the lease.

24 I think it was already confirmed on the record for
25 the other landlord but I want to make sure that that same

1 confirmation as to that the lease says what it says with
2 respect to treatment of subleases and that there's no attempt
3 here being made to overrun the provisions of the lease with
4 respect to subleasing, if there is a sublease contemplated on
5 this matter.

6 MS. GRANFIELD: With all due respect to counsel, I
7 have no idea what your lease says or what its terms are. And
8 so I can't confirm to you anything at this moment. But I can
9 confirm that we'll have to live with what 365 gives us in terms
10 of rights. That's all I can give you at this moment.

11 MR. KADEN: Fair enough.

12 THE COURT: Does that do it?

13 MR. KADEN: The same confirmation as to year-end
14 reconciliations with respect to 125 High, if the year
15 interrupts, to the extent that they're payable under the lease,
16 that those provisions will be honored as well?

17 THE COURT: Counsel, let me tell you what I think is
18 happening here, and you can't see what's going on in the
19 courtroom, which puts you at a disadvantage. You're doing a
20 really effective job of being tenacious and pressing your
21 points but I don't think you're winning them. I think that all
22 you're doing is getting reservations of rights, which is about
23 as much as you can expect at this hour.

24 And I'm also going to acknowledge, both to you and to
25 everybody in the courtroom that I'm getting tired. I've been

1 on the bench for a long time and I've been trying to
2 concentrate in a very important hearing and I think we have to
3 stop talking about these issues.

4 MR. KADEN: Fair enough, Your Honor. I apologize.

5 THE COURT: There's no reason to apologize. This is
6 an important hearing and you have clients to represent. I'm
7 just telling you that if you were watching what's going on you
8 would realize that you're losing me. I can't pay attention to
9 what you're saying and I'm trying to.

10 MR. KADEN: Okay. So then with that I will take your
11 cue and close my arguments there.

12 THE COURT: Thank you.

13 MR. HAYES: Your Honor, one more telephone objection
14 that'll take about thirty seconds.

15 THE COURT: Where are you?

16 MR. HAYES: My name is Dion Hayes, I'm with
17 McGuireWoods. I represent Toronto Dominion Bank, also Eastern
18 Time Zone.

19 THE COURT: Are you in New York City?

20 MR. HAYES: No, sir.

21 THE COURT: Okay, then I'll listen to you.

22 MR. HAYES: We have significant claims, Your Honor,
23 against Holdings LBI and certain LBI subsidiaries. We filed,
24 essentially, a joinder in Mr. Bienenstock's objection that he
25 filed on behalf of RBS. We join in his comments that he

1 articulated earlier with respect to paragraphs 4 and 10 of the
2 order. I haven't seen the order unfortunately but as it was
3 described in the hearing earlier, we share his objections to
4 those provisions. Thank you, Judge.

5 THE COURT: Okay. Thank you.

6 MR. ROESCHENTHALER: Your Honor, this is Mike
7 Roeschenthaler, also for McGuireWoods in the Eastern Time Zone.
8 I represent Access Data Corp and CNX Gas Company. Briefly,
9 Your Honor, Access Data Corp, based on the representations made
10 by counsel for the debtor about asserting late claims or
11 rejection of claims, at this point we're fine with that,
12 subject to our right to assert those claims because we -- the
13 claim of Access Data is about ten times what has been listed by
14 the debtor.

15 And for CNX Gas Company, our claim related to EU
16 Energy and based on representations by the debtor earlier, that
17 is no longer part of the sale. If that's the case, then we
18 have no objection to the sale going forward.

19 THE COURT: Thank you.

20 MR. ROESCHENTHALER: Thank you, Your Honor.

21 THE COURT: Is there anyone else on the phone? Okay.
22 Then you can mute your lines.

23 It's now 11:30 and what I said I meant, I'm kind of
24 exhausted. But I think that it's also important for us to get
25 through this. I recognize that many of the people who are

1 sitting out there have not eaten and haven't had a break in a
2 while and I think due process also includes no cruel and
3 inhuman punishment. And so I think that it may be timely,
4 before I hear from the debtors and/or also from the purchaser,
5 to take a fifteen minute break so everybody can refresh
6 themselves a little bit.

7 So since it's already as late as it is, it might as
8 well be a little bit later and let's take a fifteen minute
9 break and I'll see you at 11:45.

10 (Recess from 11:30 till 11:45 p.m.)

11 THE COURT: Be seated, please. Mr. Miller?

12 MR. MILLER: Good evening again, Your Honor. And
13 given the lateness of the hour, Your Honor, I expect to be
14 exceedingly brief, Your Honor. There have been an awful lot of
15 objectors who have stood at the lectern and it's, sort of, hard
16 after listening to twenty odd people, to remember all of the
17 comments that were made and objections that were made. But
18 there's one basic theme, Your Honor, that has gone through the
19 statements by Mr. Golden, Mr. Rosner and some others. That
20 apparently there is the ability to stop everything, take two or
21 three weeks or maybe two or three months, while we explore
22 every possible alternative. And there is no recognition, Your
23 Honor, that we have a patient that is hemorrhaging on the
24 operating table and there is no intensive care ward for this
25 patient.

1 Things have happened, Your Honor, in the last two
2 days. First of all, we have a SIPC proceeding, Your Honor. A
3 trustee has been appointed for SIPC and the assets of LBI are
4 under the jurisdiction of that proceeding. They're gone, Your
5 Honor. And as it was pointed out in the testimony today, there
6 are 639,000 accounts with a value of something like 138 billion
7 dollars that are sitting now waiting transfer. And if this
8 sale doesn't go through, Your Honor, those accounts are going
9 to be stuck. And they're going to be stuck for months and
10 months.

11 Mr. Golden says that he protects the interest of
12 creditors. I would say, Your Honor, the debtor is protecting
13 the interest of creditors. If this transaction doesn't go
14 through, Your Honor, LBI is out of business. It already is --
15 will be in a SIPC liquidation proceeding.

16 There is no money at LBHI. The DIP loan will become
17 due, 200 million dollars, as payable. Look what happened
18 yesterday, Your Honor. The CME closed us out and we took a
19 loss of one billion, six hundred million dollars. This
20 administration is finished if this transaction is not
21 completed, Your Honor.

22 It's a shame, Your Honor, that the 7,000 people who
23 are waiting for transfers today in various computer points
24 throughout the country, did not get what they expected to. And
25 I'm not being critical of anybody, Your Honor; everybody has a

1 right to express their views. But we are in a situation in
2 which we have a fragile asset that can't. This is not a case
3 where you can sit and go out and explore every single
4 opportunity. And in that connection I might say, Your Honor,
5 that for months, certainly going back to the collapse of Bear
6 Sterns and before that, Lehman has been deleveraging. It has
7 been participating in every effort to deleverage its balance
8 sheet.

9 It got down to -- let me call it the final round,
10 where there only were two possibilities: the Bank of America
11 and Barclays. And the Bank of America went off and did
12 something else. Barclays -- that transaction was unable to be
13 consummated. So in the exercise of good business judgment,
14 management and the board of directors turned to get the best
15 transactions they could get in the limited time.

16 And, Your Honor, there aren't many candidates that
17 could do this. You needed somebody with the kind of capital,
18 credit standing of Barclays. There aren't that many people out
19 there. And you can't go around and cherry pick these assets,
20 Your Honor. This is an integrated operation.

21 So what is happening, Your Honor, we are protecting
22 the customers. There's testimony on the record, Your Honor, as
23 to what the consequences would be if this transaction doesn't
24 go forward. Both Mr. Ridings and Mr. McDade have indicated
25 there won't be anybody in the building. If there's no

1 assurance of an ongoing operation for the LBI employees, which
2 are most of the employees in 745 Seventh Avenue, they're not
3 going to stay there, Your Honor. These are people who have
4 bills that they have to meet, they need employment. They need
5 some element of certainty. They're all expecting, and I'm not
6 putting any pressure on Your Honor, they're all expecting that
7 Your Honor will rule --

8 THE COURT: The pressure is already there, Mr.
9 Miller.

10 MR. MILLER: I'm sorry?

11 THE COURT: The pressure is already there.

12 MR. MILLER: Thank you, Your Honor.

13 THE COURT: Not from you.

14 MR. MILLER: No, no. I was looking for that woman.
15 There is pressure on everybody, Your Honor. I mean, I was just
16 saying to somebody, here we are sitting in a courtroom at 5
17 minutes after 12, and we've been here for a long time, and that
18 is evidence of the concern that everybody has. And I
19 understand the issues, Your Honor. As we said on the very
20 first day, this is an extraordinarily exceptional case. There
21 is so much at stake here. And if we miss this opportunity we
22 are talking about a wholesale liquidation with all of the
23 consequences that come out of that liquidation. And people can
24 speculate as to what's going to happen.

25 I mean, I was a little shocked at Vanguard, who

1 happens to be a competitor of Neuberger, saying don't close
2 this. It'll be a good thing for the marketplace, for somebody
3 maybe. So I think that argument, Your Honor, just doesn't
4 carry water.

5 Now I would turn, just for a minute, Your Honor, to
6 the LBIE thing, which is confusing this whole matter. I point
7 out, Your Honor, LBIE went into administration before the
8 Chapter 11 case was filed. And PWC froze all transactions
9 immediately and it became the administrator. So those
10 transactions were frozen.

11 Now, what we're talking about, Your Honor, is eight
12 billion or five billion, whatever it might be, Your Honor, that
13 was a cash sweep. Cash, we're not transferring any cash to
14 Barclays, that's out of the agreement. So if Mr. Rosner or
15 somebody else has a claim, they can assert a claim. It has
16 nothing to do with this transaction.

17 And I would also point out, Your Honor, that PWC as
18 the administrator is not opposing the sale. In fact, they're
19 supporting the sale. They're just reserving their rights and
20 they should reserve their rights. If they have a claim, this
21 is all going to be investigated. But we have to look at the
22 bigger picture, Your Honor, what happens if we don't close this
23 transaction. And Mr. Ridings testified, Mr. McDade testified
24 as to the consequences that will affect these estates. We
25 cannot reverse what has already happened.

1 And in the short period from Wednesday to Friday,
2 notwithstanding that Your Honor approved the sale procedures,
3 we lost the confidence of the market. And if you don't approve
4 this transaction, Your Honor, LBI is finished as an operating
5 business. It will not add any value to anybody. And all we
6 will have left, Your Honor, is a winding down estate and
7 holdings. And if that building is empty, Your Honor, it won't
8 be worth 900 million dollars because that's the nature -- that
9 appraisal that we got assumed a value with the building in use.

10 So the dangers here, Your Honor, are extraordinary.
11 This is a good transaction, Your Honor. We spent a lot of time
12 listening to landlords. All of those issues, Your Honor, are
13 minor and will be resolved in one way or the other. Either
14 Your honor will decide them or there will be mutual
15 arrangements and agreements among the parties.

16 The drafting of the order, I think, Your Honor, if we
17 all sit down in good faith we will come up with an order. I
18 think we will come up with an order tonight if Your Honor were
19 to approve this transaction.

20 THE COURT: I'm prepared to stay here for as long as
21 it takes if you're prepared to stay here for as long as it
22 takes.

23 MR. MILLER: Your Honor, I can't think of a better
24 place to be.

25 THE COURT: Do you want to order pizza? How do you

1 want to nourish yourself between now and the entry of the
2 order?

3 MR. MILLER: With pepperoni?

4 THE COURT: Whatever you want.

5 MR. MILLER: I agree with Mr. Bienenstock -- maybe
6 let me rethink that. Your Honor, I would stay without food. I
7 think that's a good thing. And I would lock all of the
8 latrines. I'm sorry; I withdraw that remark, Your Honor.

9 THE COURT: Unfortunately, it's on the record of this
10 proceeding.

11 MR. MILLER: And, Your Honor, the proceeds of the
12 sale, the 250 million dollars, is going to the SIPC trustee,
13 the one billion 290 million dollars is going to the estate.
14 There is a creditors' committee. Those proceeds are safe.
15 Hopefully, we're going to go into the more conventional
16 procedures of Chapter 11.

17 I don't want to use the melting ice cube. It's
18 already half melted, Your Honor. The steps have had happened,
19 the things that have happened since Wednesday, make it
20 imperative that this sale be approved. In the interest of all
21 of the stakeholders, including Mr. Golden's clients, they will
22 benefit by this, Your Honor, because if the alternative
23 happens, there will be very little to distribute to creditors,
24 if anything.

25 So we submit to Your Honor that this sale should be

1 approved and should be approved tonight. And we should get the
2 orders entered and get the transfers done before there's any
3 other prejudice and harm. Thank you, Your Honor.

4 THE COURT: Thank you, Mr. Miller.

5 MS. GRANFIELD: Really brief, Your Honor, because I
6 won't tread over any ground that Mr. Miller just went over.
7 The importance, if Your Honor is so disposed to approve the
8 transaction of staying here, getting the order done and getting
9 it entered tonight, my client wanted me to express to you the
10 importance is really not only in terms of the operations, the
11 moving of the money, the preserving of the value for this
12 estate, but the importance in terms of staying here and get it
13 done tonight is really with respect to the employees who we've
14 already heard many times have really had a horrible week. They
15 have had a bit of hope in terms of being able to return to a
16 more business as usual. And we're really concerned if they
17 don't wake up tomorrow and see that not only has it been
18 approved but the order's been entered and we're moving forward
19 towards closing.

20 Just generally, with respect to the objections,
21 Barclays Capital cannot pay out the sums that have been put on
22 the record tonight and subject itself to collateral attack.
23 It's not doing this transaction to paint a bullseye on its back
24 for every subsidiary creditor, landlord, fund that wants to
25 figure out who's a deep pocket, oh, Barclays is doing this deal

1 so it's one of the three or four deep pockets that could have
2 and so we're going to reward by miring it in collateral
3 litigation. If there's really any chance of that, it won't
4 happen. And this will all be for naught. So we do have to
5 keep our eye on that ball.

6 And then finally, Your Honor, in the proffer of some
7 of the testimony tonight, and this had been said before, and it
8 may have been the belief of the parties who had said it, but
9 it's important with respect to Barclays and its relationship
10 with regulators in the U.K. that we wanted to make a pointed
11 statement that it has not only been the U.S. regulators that
12 have really gone above and beyond to try and facilitate this
13 transaction. But the regulators in the United Kingdom have
14 done so as well. And there was speculation, really, that maybe
15 the U.K. regulators had some to do with not having the prior
16 transaction that was worked on last week come to fruition. And
17 it turns out that's not the case. It really was not a
18 regulatory issue but just a question of the structure of the
19 transaction would have required Barclays to have a
20 shareholder's vote in order to do the transaction and that just
21 was not going to happen with the precipitous terrible things
22 that were happening at the time. And so, we just wanted to
23 correct the record with respect to that. And with that, I'll
24 turn it over to others.

25 MR. BIENENSTOCK: May I respond for a moment, Your

1 Honor?

2 THE COURT: Yes, you may.

3 MR. BIENENSTOCK: I just want to point out that,
4 number one, we all understand the importance of the
5 transaction. And it's very easy for a party sponsoring it to
6 say, and I won't do it unless you give me something illegal, so
7 give it to me, Judge. I'd like to point Your Honor to some
8 evidence Your Honor admitted, the contract. Nowhere in that
9 contract does it say they need an order that's free and clear
10 of successor liability from creditors of non-debtor
11 subsidiaries. Nowhere. This is just overreaching and gambling
12 that Your Honor feels this is so important that you'll do
13 something illegal so they'll close tonight. Thanks.

14 THE COURT: It's my job to do what the law permits in
15 the exercise of my discretion. This week, more than any other
16 week since I was appointed to the bench, I have felt the
17 awesome power of this job. And it's now Saturday morning.
18 I've given a lot of thought the objections. I reviewed each
19 one that I could get. They were flying in this afternoon one
20 after another. And I categorized them in my mind and
21 considered carefully whether it was permissible for me as a
22 judge in this district to approve a transaction this momentous
23 on such an extraordinarily fast schedule. And I gave
24 consideration to the due process considerations that have been
25 articulated in objections both orally and in writing. And I

1 have concluded that this is really not a question of due
2 process being denied. This is a question of due process being
3 pursued in good faith by all parties to the transaction, even
4 the objectors. It is a testament to the importance of this
5 transaction that this courtroom is still packed. I have no
6 idea what's going on in the overflow rooms. This is not an
7 ordinary Chapter 11 case.

8 This is not simply approving the transaction because
9 Mr. Miller is putting pressure on me to do so. This is not
10 approving the transaction because I know it's the best
11 available transaction. I have to approve this transaction
12 because it's the only available transaction.

13 I believe that one of the remarkable aspects of our
14 Bankruptcy Code, as it has evolved, is its remarkable
15 flexibility to different circumstances. The lawyers who are
16 appearing before me this evening are truly among the best and
17 the brightest in the field. And some have participated in the
18 evolution of bankruptcy as a field, nationally and
19 internationally. We must close this deal this weekend not
20 because the markets demand it, although that's certainly a part
21 of it. Lehman Brothers became a victim. In effect, the only
22 true icon to fall in the tsunami that has befallen the credit
23 markets. And it saddens me. I feel that I have a
24 responsibility to all the creditors, to all of the employees,
25 to all of the customers and to all of you. Arguments have been

1 made this evening by objectors, some questioning whether or not
2 if I were to delay approval another better transaction might be
3 realized or discovered. And that's a preposterous notion. As
4 I said on Wednesday, it's very apparent to me that for a
5 transaction of this sort to happen, only Barclays can do it.
6 Only Barclays has the support of the regulators. Only Barclays
7 is prepared to close. Only Barclays can deliver the customer
8 accounts to safe harbors. And the customer property, which is
9 the principal concern of the SIPC trustee, a case which is also
10 pending before me now, will be best protected by virtue of
11 approving the sale.

12 The objectors, and I'm not putting them all in the
13 same basket, principally, Mr. Golden and Mr. Rosner's clients,
14 argue passionately that I should not be unduly influenced by
15 the arguments made by the debtors that the markets will, in
16 fact, tank if this deal is not approved and that more time
17 should be afforded to searching for an alternative. I am
18 persuaded that to do so would be reckless. I believe that the
19 debtors have acted in the utmost of good faith in trying to
20 make the best out of a terrible situation. The comments made
21 by the SIPC trustee so many hours ago in reference to the
22 cooperation, the unusual cooperation that has characterized the
23 commencement of the SIPC proceeding and the coordination of
24 that proceeding with this bankruptcy case demonstrate not just
25 that New York lawyers and consultants can be good citizens but

1 that we all recognize that we're engaged in something here
2 that's very special. This is the most momentous bankruptcy
3 hearing I've ever sat through either as a lawyer or as a judge.
4 And I'm guessing I'm not alone in that sense.

5 One could be a theoretical bankruptcy jurist and say
6 transactions such as this should always be subject to more time
7 so that parties can better assess the consequences of the
8 transactions. Bankruptcy Rule 6003 which was enacted recently
9 was designed among other things to slow down activities in the
10 first twenty days of big bankruptcy cases. This is Friday.
11 This case was filed on Monday. What we're doing is unheard of
12 but imperative.

13 I am completely satisfied that I am fulfilling my
14 duty as a United States bankruptcy judge in approving this
15 transaction and in finding that there is no better or
16 alternative transaction for these assets, that the consequences
17 of not approving a transaction could prove to be truly
18 disastrous. And those adverse consequences are meaningful to
19 me as I exercise this discretion. The harm to the debtor, its
20 estates, the customers, creditors, generally, the national
21 economy and the global economy could prove to be incalculable.

22 Moreover, it's not just about avoiding harm.
23 Approving the transaction secures whether for ninety days or
24 for a lifelong career employment for 9,000 employees at Lehman,
25 and holds together an operation the value of which is really

1 embedded in the talent of the employees, their knowledge, their
2 relationship, their expertise and their ability to create value
3 to the economy.

4 Earlier today, I guess it was yesterday, I said that
5 I was concerned about the real estate value in this
6 transaction. I still am but I'm getting over it. I believe
7 that sophisticated negotiations cannot be parsed neatly into
8 the constituent parts because they're integrated and
9 interrelated in the result of give and take. I'm unable to
10 value a piece of New York City real estate and there's been no
11 real evidence presented although the appraisal has been alluded
12 to. I suppose it is theoretically possible that if the office
13 building at 745 Seventh Avenue were subject to marketing and
14 auction procedures over a lengthy period of time and were
15 somehow viewed as a quasi trophy property that perhaps it might
16 bring more value. But that's speculation. As to the data
17 centers, I have no idea. I'm not even sure I know what a data
18 center. I expect it's a place that has servers and deals with
19 the back office needs of a large operation such as this. And
20 that, in a sense, describes part of the problem for me as a
21 judge here. I know that I need to approve this transaction. I
22 am absolutely confident in my judgment. But I also know that
23 this is so exceptional relative to the experience that I have
24 had both as bankruptcy lawyer and as judge to know that it
25 could never be deemed a precedent for future cases unless

1 someone could argue that there is a similar emergency. It's
2 hard for me to imagine a similar emergency.

3 And so, as to those objectors who say it would be
4 establishing bad precedent to approve this transaction, I say
5 no. This is not a bad precedent. To the contrary. It's an
6 extraordinary example of the flexibility that bankruptcy
7 affords under circumstances such as this. It's an example that
8 creative minds working diligently day and night even under the
9 worst of circumstances can create remarkably complicated
10 transactions that preserve value. I am proud to have been part
11 of this process.

12 I'm also satisfied that if everybody stays who needs
13 to comment on the order that some of the legal issues that have
14 been raised during the objection phase of this hearing can be
15 addressed. I note the arguments made by Mr. Bienenstock on
16 behalf of the Walt Disney Company, that I can't do anything
17 that's illegal. And he's right. However, it's not illegal to
18 enter orders that include from time to time language that
19 people dispute or language that may be ambiguous or language
20 that might have been better drafted. I regret to say that I
21 think I do it every day. And most of it's because I enter
22 orders that you draft. So, I don't think it's illegal for me
23 to do something that may lead to an argument in the future as
24 to what the language of the order means.

25 As far as Mr. Rosner's arguments are concerned and

1 those of others who have talked about the sweeping of cash out
2 of the European operations on the Friday before the filing
3 here, I'll repeat what I referred to earlier. There's no
4 evidence with respect to that although there's been a lot of
5 discussion about it. I'm satisfied that given the fact that
6 Barclays is not taking cash and the only thing that came in to
7 the debtor from Europe was cash that in practical terms we
8 should be safe. The cure objections will be dealt with in
9 accordance with the understandings and representations made by
10 Mr. Miller on behalf of the debtors. And I presume that unless
11 that's worked out consensually that at some point I'll have an
12 opportunity to hear evidence with regard to proper cures.

13 I believe I dealt with the matters that are before me
14 and that the remainder of the evening should be spent with
15 those lawyers who need to address the substance of the order to
16 work together to develop that in a form that's either purely
17 consensual, or to the extent it's not, can be entered by me
18 provided that the areas of disagreement are highlighted. I
19 will remain available for as long as it's necessary so that to
20 the extent there is a need to put anything on the record or to
21 confer with me that you'll be able to do so. I would note,
22 however, just in the interest of avoiding an all-nighter that
23 to the extent it would be feasible for the order to be
24 completed given the fact that it is mostly done within the
25 next, say, forty-five minutes, that would be desirable.

1 Would you like to be heard, sir?

2 MR. KOBAK: Yes. James Kobak, Hughes, Hubbard & Reed
3 for the SIPC trustee. There's also an order in the SIPC case
4 which -- a proposed order which we presented to Your Honor
5 which, essentially -- in fact, what it does is adopts and
6 incorporates by reference the order approving the sale in the
7 Chapter 11 case and to our proceeding.

8 THE COURT: Whatever that order might end up saying,
9 I take it. So that in effect --

10 MR. KOBAK: Yes, that's correct. But when that order
11 is entered, if Your Honor would entertain the other order
12 because it is a condition to approval of the contract.

13 THE COURT: I certainly will.

14 MR. KOBAK: I have a copy with me.

15 THE COURT: Do you have a copy of that order?

16 MR. KOBAK: Yes. If I may?

17 THE COURT: You may. Does it also have an electronic
18 disk that goes with it?

19 MR. KOBAK: Yes, it does.

20 THE COURT: Okay.

21 MR. KOBAK: Thank you, Your Honor.

22 THE COURT: Thank you.

23 MR. BIENENSTOCK: Your Honor, may I be heard?

24 THE COURT: Mr. Bienenstock?

25 MR. BIENENSTOCK: Yeah. I'm trying to take Your

1 Honor's cue. I think Your Honor came up with a solution to the
2 issue I had raised in terms of ambiguous language which might
3 obviate any change in that regard depending on whether Your
4 Honor feels inclined to comment on the following question. Is
5 it fair for us to infer from Your Honor's remarks that if we
6 leave the language alone and one day we'll come back to Your
7 Honor, if necessary, to resolve its ambiguity that Your Honor
8 would be inclined based on your first comments that you'll
9 interpret it based on what was legal?

10 THE COURT: I'm obligated as a matter of my oath to
11 interpret everything in a manner that I consider legal.
12 Occasionally, however, I'm told I've made mistakes.

13 MR. BIENENSTOCK: Well, we all do. But I asked the
14 question for this reason. There is bankruptcy jurisprudence
15 that if a bankruptcy judge, like, discharges a third party
16 claim and you don't object, you're stuck with it even though it
17 was illegal. And I just want to be clear here that if we leave
18 the language alone, make the evening shorter, but come back to
19 Your Honor, Your Honor's intent is to interpret it as to what
20 would have been legal.

21 THE COURT: I'm disinclined to ever state from the
22 bench, even when there are only a couple of people in the room,
23 what my intent is. I'm prepared to say, however, that in the
24 event that parties were to return to this court at some time in
25 the future to seek an interpretation of what I meant in one of

1 my orders that I will look at the language probably with a
2 clearer head than I have right now and attempt to reasonably
3 parse the words and, in doing so, make a judgment as to not
4 only what the language means but how it should be applied as a
5 legal matter.

6 MR. BIENENSTOCK: Thank you, Your Honor.

7 MR. LEMAY: Your Honor, very brief?

8 THE COURT: Mr. LeMay? This is sort of remarkable
9 because I thought that I had ruled and that I was going to
10 leave and that everybody was going to do some work. But here
11 you go.

12 MR. LEMAY: Your Honor --

13 THE COURT: And you were so good about saying that
14 you're going to be brief when you spoke earlier.

15 MR. LEMAY: And I'll be even briefer now, Your Honor.
16 David LeMay from Chadbourne & Parke. I had raised in my
17 argument the concept of an escrow of the purchase price. Mr.
18 Miller, I think, basically took issue with that. I didn't hear
19 Your Honor's ruling encompass that issue and I simply ask that
20 Your Honor --

21 THE COURT: It does not encompass that issue. You've
22 confirmed that I did not address that issue at all. So it
23 would have been probably even better had you said nothing.

24 MR. LEMAY: Thank you, Your Honor.

25 THE COURT: We're adjourned as far as this hearing is

1 concerned.

2 ALL: Thank you, Your Honor.

3 (Applause)

4 (Whereupon these proceedings were concluded at 12:41 a.m.)

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I N D E X

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EXHIBITS

PARTY	NO.	DESCRIPTION	PAGE	LINE
Debtor		Copy of execution copy of asset	133	23
		purchase agreement among LBHI, LBI,		
		LB 745 LLC and Barclays Capital, Inc.		
		dated 9/16/08 and first amendment		
		thereto dated 9/19/08		

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DESCRIPTION	PAGE	LINE
Debtor's motion for an order confirming status of Citibank clearing advances approved	57	1
Sale transaction approved	245	25

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C E R T I F I C A T I O N

I, Lisa Bar-Leib, certify that the foregoing transcript is a
true and accurate record of the proceedings.

Lisa Bar-Leib

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